No. 2639

IN THE

# United States Circuit Court of Appeals

**For the Ninth Circuit**

PABST BREWING COMPANY (a corporation),
*Plaintiff in Error,*

vs.

E. CLEMENS HORST COMPANY (a corporation),
*Defendant in Error.*

## BRIEF FOR PLAINTIFF IN ERROR.


HELLER, POWERS & EHRMAN,
*Attorneys for Plaintiff in Error.*

THOMAS J. GEARY,
JAMES L. ROBISON,
*Of Counsel.*


*Filed this.....day of October, 1915.*

*FRANK D. MONCKTON, Clerk.*

*By.....Deputy Clerk.*




PERNAU PUBLISHING COMPANY

# INDEX.

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Defendant in error is a New Jersey corporation dealing in hops, both as a grower and as a merchant, buying from growers and selling to brewers. It has hop-yards in several parts of the State of California, and also in the State of Washington. E. Clemens Horst is its president, manager and principal owner. Its main California office is in San Francisco. Pabst Brewing Company is a Milwaukee corporation carrying on a general brewing and selling beer in various parts of the United States, including the State of California.

This action was brought by defendant in error against plaintiff in error to recover $32,000 damages for alleged breach of contract to accept and pay for 2000 bales of hops of the 1912 crop.

Plaintiff in error filed a cross-complaint alleging that defendant in error agreed to sell them goods of the character of certain samples and had failed to do so and that plaintiff in error was thereby compelled to buy hops to fill their requirements and that thereby they were damaged in the sum of $2500.

The verdict was in favor of Horst Company for $22,625.30.

For brevity sake and to prevent the usual confusion in the use of names describing the parties, which results where plaintiff in the lower Court has become defendant in error, we will refer to plaintiff in error as the Pabst Company and defendant in error as the Horst Company.

Hops are prepared for market by first picking them and storing them in a house called a drying house. They are therein dried by the application of artificially heated air (p. 95). The Horst Company had a peculiar method of applying the hot air necessary to dry the hops; that is to say, it heated the air outside the building and forced the hot air within the containing building into the chamber containing the hops in order to dry the green hops; while all other growers heated the air within the containing building and applied the air within the containing building (p. 55).

Horst attempted to establish a distinguishing term for hops cured by his process and himself used the name "air dried" for that purpose. He, himself, and all other experts testified that no one (not even Horst himself) could distinguish hops after drying as to whether they had been submitted to the so-called "air dried" process or not (p. 101). And all experts except Horst testified that there was no term "air dried" used in the hop trade to distinguish hops of the so-called "air dried" process (pp. 90, 95).

Cosumnes hops—are those grown in a district near the Cosumnes River, Sacramento County, California. The largest shipping point and usual market place for hops near it being Sacramento City.

The Horst Company claims the transaction was closed by a series of letters and telegrams whereby the Pabst Company bought 2000 bales of a peculiar "air dried" Cosumnes hops. The Pabst Company claims that the word "air dried" used in these negotiations was not meant as a distinctive term and that the said negotiations did not come to a binding contract because when preliminary telegrams ceased, each party sent to the other a draft of a contract wherein each inserted numerous conditions additional to those referred to in the telegrams and agreements as to the time of delivery entirely different from each other and neither party accepted the draft of contract offered by the other and both abandoned the correspondence without either draft of

contract being accepted or any signed contract being executed.

The parties entered into new negotiations in 1912, which superseded the 1911 negotiations and thereby finally an agreement was made, viz.: The Horst Company agreed to sell hops equal in quality to four samples (21 to 24) of Cosumnes hops (which were not "air dried") forwarded by Pabst Company to Horst Company as type samples and Pabst agreed to buy same at 20c and freight and in that way the importance of the term "air dried" was entirely eliminated.

Before the type samples were forwarded Horst Company had forwarded to Pabst Company samples 1 to 20 which were entirely the product of the Horst Ranches by his "air dried" process. After the forwarding of the type samples Horst Company forwarded to Pabst Company samples 25 to 38 which were not all of the Horst "air dried" character but were Cosumnes hops of a character which Horst Company contended were equal in quality to the type samples.

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## A Statement of the Facts of the Case Can Be Given Incidentally as the Errors Are Pointed Out.

During the trial of the case the following errors arose, viz.:

### AS TO ERROR BECAUSE TESTIMONY CONFINED TO "AIR DRIED" HOPS.

1. The Horst Company adopted the theory that the contract referred to hops cured in their peculiar

way and that no other hop grower which Horst Company called "air dried".

Mr. Horst, its president, admitted that the so-called "air dried" hops were exactly similar in appearance to all other hops when offered to the public (p. 101).

Horst Company alone used the peculiar process by its president called "air dried" process.

All the experts *including* Mr. Horst agreed that after the hops were cured no one was able to distinguish those which had been cured by the "air dried" process from those which had been cured by the other process (p. 101).

Horst testified (p. 108):

> "I cannot tell the difference between 'air dried' Cosumnes and 'kiln-dried' Cosumnes hops after they are dried. To look at them you could not tell the difference."

All except Mr. Horst agreed that no such distinction or term was known to the trade (pp. 95, 257, 270, 280).

The word "air dried" is nothing more nor less than a term used by Mr. Horst to describe a process. He testified at page 108 as follows:

> "Q. When you speak about air-drying it provides for the manner in which the crop is cured?
>
> A. It refers to the manner of curing the crop.
>
> The COURT. In other words, air-drying does not refer to the particular character of the hops that is grown.

A. No, sir.

Q. It simply refers to the mode or method or manner of curing it?

A. That is all. * * * *I cannot tell the difference between air-dried Cosumnes and kiln-dried Cosumnes hops after they are dried. To look at them you could not see the difference.*"

The Court in the trial of the case adopted the Horst Company's theory and prevented the introduction of testimony on facts as to prices and quality of other Cosumnes hops to the great damage of the Pabst Company's case.

No person except the Horst Company's employees had ever had any dealings with the so-called "air dried" hops, knowing them to be such.

All persons in the hop business were unable to distinguish the so-called "air dried" hops from other hops after they were cured; and only Mr. Horst and his employees knew which hops on the market were that particular kind of hops and they, only because of artificial extrinsic adjuncts such as the bags in which they were contained or the wrappers, which were not marked "air dried".

All the hop experts except Mr. Horst testified that there was no term "air dried" hops used in the hop trade; and that all hops were "air dried" and that these two words were no more descriptive of the character of a hop nor its appearance when on the market or for purposes of selling than would have been the words "on a vine grown"

or "in a hop house dried" or hops "that were once in an automobile truck in Sacramento".

Nevertheless, the Court limited all evidence as to value and character of hops to the so-called peculiar "air dried" hops or practically of hops grown by Horst Company alone, and only allowed witnesses to testify directly as to quality or price, who knew about the so-called "air dried" hops.

*This ruling practically limited deliveries on the purchase to hops grown by Horst himself; and limited testimony as to quality to Horst and his employees.*

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AS TO REJECTION OF TESTIMONY OF EXPERTS WHO DID NOT KNOW HORST HOPS BY THE APPELLATION "AIR DRIED".

Experts who were familiar with the Sacramento market but who did not know "air dried" hops of the character referred to by Horst Company as such, were produced by Pabst Company on questions of value and price and the Court refused to allow them to testify as to the value and sale price of hops in November, 1912, unless their testimony referred to "air dried" hops of the peculiar Horst process.

This practically prevented Pabst Company obtaining any experts because none but Horst Company's employees knew which hops on the market were the so-called "air dried" hops although all looked exactly alike and were commercially the same.

THE WRITTEN DOCUMENTS THEMSELVES SHOW THAT NO IMPORTANCE WAS GIVEN TO THE WORDS "AIR DRIED" BY THE PARTIES AND THAT THE FINAL CLOSING TRANSACTION DID NOT IN ANY WAY REFER TO "AIR DRIED".

The transactions in question commenced by Horst Company included in a day letter to Pabst Company August 24, 1911, concerning the sale of some 1911 hops an offer as follows:

> "We offer thousand air dried cosumnes Twelve at Twenty plus freight" (p. 48).

To this Pabst Company replied on August 26, 1911, by regular telegram:

> "Will take thousand bales Cosumnes twelves strictly choice quality twenty cents fob Milwaukee" (p. 49).

It will be observed that this reply does not refer to "air dried" hops, but to strictly "choice quality".

To this telegram last referred to Horst Company replied by night lettergram dated August 25, 1911, to the Pabst Company:

> "We offer one thousand bales twelves choice air dried Cosumnes delivered Milwaukee at twenty cents plus freight this is positively best we can do we expect to run about thirty cents coast" (p. 49).

To this Pabst Company replied under date of August 26, 1911:

> "We accept offer one thousand bales choice cosumnes air dried ninteen twelve crop twenty cents fob" (pp. 49, 50).

It will be noted that in this telegram Pabst Brewing Company for the first time do use the same language as plaintiff "choice air dried".

On August 27, 1911, Horst Company telegraphed Pabst Company confirming the sale of this one thousand bales and added:

> "Offer you additional thousand bales at same price also offer you subject our confirmation of sale additional thousand bales eleven crop at forty cents delivered at Milwaukee freight paid. Our offer on twelve crop from your standpoint is exceptionally low one. As our sales of twelve crop increase will increase price accordingly only able to make you this low offer because of our unsold surplus" (p. 51).

To this night lettergram Pabst Company wired Horst Company on August 28, 1911:

> "We accept your offer one thousand bales strictly choice Cosumnes nineteen twelve crop at twenty cents fob please confirm" (p. 50).

The Court Will Note That Nothing is Said in This Last Telegram About "Air Dried", But That the Words "Strictly Choice" Are the Only Qualifying Adjectives Inserted to the Word "Cosumnes".

On August 29, 1911, Horst Company telegraphed to Pabst Company:

> "We confirm sale to you of another one thousand bales choice nineteen twelve crop cosumnes at twenty cents delivered Milwaukee plus freight charges making total sales to you of nineteen twelve crop two thousand bales" (p. 50).

The Court will observe that in this telegram Horst Company itself says nothing about "air dried" and does accept Pabst Company's language concerning quality, to wit: "choice".

Upon September 4, 1911, Horst Company wrote to Pabst Company referring to this transaction and saying:

> "Enclosed herewith we hand you contracts in triplicate for the two lots of 1000 bales Choice Pacific Coast 1912 crop Air Dried Cosumnes Hops, as per telegraphic sales made you on August 26th, and August 29th, respectively.
>
> Please be good enough to sign all three contracts of each set and return two of such set to us.
>
> If you do not wish the sharing clause (clause 18) of the contract, please strike it out, and in the case the elimination of that clause will be satisfactory to us" (p. 315).

This offer of contract was received by Pabst Company. The tendered contracts in triplicate contained very many new conditions such as

> "The seller agrees to sell to the buyer 1000 bales hops *about equal* to or better than choice Brewing Pacific Coast Air Dried Cosumnes Hops" (p. 316). "Time of shipment * * * during months inclusive of September to December following harvest * * * with such extra time as provided in paragraphs 12 to 16" (p. 317). "Difference, if any, between quality sold and quality hereunder shall entitle Buyer to equivalent allowance but not to rejection of delivery" (p. 319).

This offer was never accepted by Pabst Company, and the draft of contract was never signed by Pabst Company.

On the contrary on September 8, 1911, Pabst Company wrote to Horst Company a so-called purchasing order sent in duplicate, reading as follows (p. 112):

"Purchase Order No. 54808
Req. " C.Z.
Dept.

*Pabst Brewing Co.*

Milwaukee, Wis., Sept. 8, 1911.

E. Clemens Horst Co.,
San Francisco, Cal.

Please forward the following to Chestnut St., Dept via C. M. & St. P. These goods must reach us Shipments to be made during October, November, December, January and February.

2000 bales choice air dried Cosumnes California Hops,
Crop 1912 at 20¢ per pound f.o.b. Coast.
We insist on submission of samples and approval thereof before shipments are made.
Mail bill at once, putting *purchase order number* thereon.

Also mail *Bill of Lading* with weight and through freight rate. All goods are received subject to our count or weight and inspection. Terms: Cash, less 2 % 10 days after goods are delivered or on or before 10th of Month following purchase; otherwise settlements are made on the 22nd of each month following purchase of goods.

All freight charges must be prepaid.

If you cannot ship so that goods will reach us on the day specified above, notify us at once, giving date on which you can ship.

PABST BREWING CO.,
H. J. Stark,
Secretary."

Pabst Company claim that these orders were retained by Horst Company and never were returned them.

But Horst Company claims they were returned with a letter, and offered in evidence a copy of said letter dated September 12, 1911, in which they say (p. 215):

"Sept. 12th, 1911.

Pabst Brewing Co.,
Milwaukee, Wis.

Gentlemen:

Enclosed herewith we return you purchase orders #54807/8 covering 500/B/01911 Air Dried Cosumnes Hops and 2000 B/01912 Air Dried Cosumnes Hops.

We have already sent you Hop contracts signed by us and covering the above, and are now awaiting their return when signed by you.

Yours faithfully,
E. CLEMENS HORST CO.,
E. C. Horst."

ECH/J
Encls.

But Horst Company does not claim that the draft of hop contracts sent by them referred to in the last paragraph of said letter was ever executed by Pabst Company.

Consequently, whichever way the question as to the forwarding of this letter be decided, the testimony remains undisputed that Pabst Company

never accepted the draft of hop contract as sent by Horst Company and the only offer of a contract ever tendered by Pabst Company to Horst Company was that tendered in the so-called purchase orders which were not acted on by the Horst Company and which it claims to have returned unsigned on September 12, 1911.

In either event the undisputed testimony shows that on September 12, 1911, the minds of the parties had not met as to the terms of any contract.

The transactions then remained in *status quo* until a year afterwards when under date of September 27, 1912, Horst Company sent a night letter to Pabst Company saying (p. 52) that Mr. George (Horst's representative in Chicago) had wired them that Pabst Company was negotiating resale to other dealers of the two thousand bales Cosumnes sold to them by plaintiff, and added:

> "We are willing hold these hops on coast if you accept deliveries now on coast less freight allowance. We are willing resell the two thousand bales for your account or we are willing to exchange all or part * * * We must know your conclusions now so we can complete our nineteen twelve deliveries to other buyers please wire us fully direct to San Francisco" (p. 52).

To this the Pabst Company wired Horst Company under date of September 26, 1912:

> "Will not accept deliveries now or make any trade before full line of samples submitted to us may consider cancellation of contract with offer from you" (p. 133).

Upon receipt of this last wire the Horst Company wrote Pabst Company saying:

> "We sent you today by first class delivery mail twenty samples of hops, including a number of samples of 1912 Cosumnes hops of the contracted quality" (p. 133). Adding "We will thank you to wire us upon receipt of the above samples numbered 1 to 20 all the numbers that you prefer and please give us the numbers in order of your preference and we will fill your order as much as possible in the order of your preference" (p. 134).

The Court will note that this last quoted wire establishes that Horst Company accepted Pabst Company's interpretation of the contract set forth in their purchase order, viz: that samples were necessary to be submitted in order to comply with that interpretation of the contract.

*Particular attention is also called to the fact that Horst Company makes no mention of "air dried" hops in any of the 1912 letters.*

Under date of October 4th, Pabst Company notified Horst Company concerning these samples that

> "after close inspection it will be impossible for us to accept hops of this nature on our contract, as same are not choice" (p. 63).

Under date of October 9, 1912, Horst Company wired Pabst Company asking them to wire wherein they claimed samples submitted were below quality (p. 64).

To this Pabst Company replied on October 9, 1912, saying:

"Color shows no life, picking poor flavor and substance of samples submitted by you in no way compare with other choice cosumnes submitted by others" (p. 64).

To this on same date Horst Company by night lettergram replied:

"Referring your today's wire please send us line of samples of such cosumnes hops as you will accept" (p. 64).

Under date of October 10, 1912, Pabst Company replied:

"In reply to your telegram of to-day we beg to state that we have forwarded you four samples of choice cosumnes hops. Kindly compare these with your samples" (p. 65).

It will be noted that all mention of "air dried" as description of hops had been abandoned by both parties.

Under date of October 14, 1912, Horst Company wired:

"Have received from you two of four samples advised in your letter October tenth please wire us that you will accept deliveries equal to those four samples and we will try arrange deliveries accordingly and if you will please wire us from whom you received the four samples you sent us we will try to purchase the identical lots for deliveries to you" (p. 65).

To this Pabst Company replied under date of October 15, 1912:

"Must see samples cosumnes deliveries you can make equal four samples mailed you as we expect to dispose of same on coast" (p. 66).

To this Horst Company replied to Pabst Company under date of October 15, 1912:

> "If you wire you will accept hops equal samples you sent we will arrange accumulate such hops for you but we cannot submit further samples without we buy hops and we cannot buy and increase our stock unless you wire you will accept hops equal your samples" (p. 66).

Thereby Horst Company offered a complete settlement of differences and to substitute a new agreement for the pending inchoate contract.

To this Pabst Company replied by night lettergram under date of October 21, 1912:

> "Will accept hops on contract equal four samples you received from us but insist upon you forwarding samples of deliveries before shipments go forward" (pp. 322, 323).

Thereby Pabst Company accepted Horst Company's last mentioned offer and if any contract was made by the parties this lettergram showed it as a contract of sale by samples equal to type samples sent, viz., 21 to 24. These were in no way connected with Horst process "air dried" hops.

Under date of October 23, 1912, Pabst Company wrote to Horst Company notifying them that if they had delivered choice Cosumnes hops equal to four samples mailed them defendant would have accepted same as follows (pp. 323, 325):

> "Pabst Brewing Company.
> Milwaukee, Wis., October 23d, 1912.
> E. Clemens Horst Company,
> San Francisco, Cal.
> Gentlemen:—
> Your favor of the 18th inst., at hand and contents noted. We beg to state that we never

committed ourselves not to take the 2000 bales of Choice Cosumnes hops on contract, equal to the four samples we submitted to you, as you will note in our telegram to you of October 21st, to which we have no reply at the present time, in which we asked you to forward samples of deliveries you can make equal to the four samples mailed you, and furthermore, we beg to state that there was no specified time mentioned when hops were shipped, and the entailed loss you have had up to the present time by holding these hops has nothing to do with this deal whatever. If you could have delivered choice Cosumnes equal to the four samples mailed you we would have accepted same, but insisted on you forwarding samples, which you have not done up to the present time. We certainly would not accept any Cosumnes equal to any of your 20 samples submitted to us, as the quality is too poor. Furthermore, we beg to state that our replying to dispose of same on the Coast would not prevent you from forwarding samples as we must insist upon seeing what we buy.

We are also desirous of letting you know that we use Cosumnes and Sacramento hops in our brewery, but of a much better quality than any of your samples submitted. What we have published is that we would not use any more Cosumnes like your 1911 shipment, which you must admit were the poorest picked hops on the Coast. We are also not at liberty to let you know from whom we received the four samples Choice Cosumnes, but we must insist upon you forwarding samples of choice Cosumnes equal to the four samples, whether you have same in stock or not.

Hoping to hear from you, we remain,

Yours truly,

PABST BREWING COMPANY,

By C.Z."

CZ-M

By C.Z."

Under date of October 29, 1912, Horst Company wrote Pabst Company and acknowledged receipt of said last quoted letter of October 23, 1912, as follows (p. 325):

"San Francisco, Oct. 29th, 1912.

In reply refer to H-57158.

Pabst Brewing Co.,
Milwaukee, Wis.

Gentlemen:—

1912 Crop Sales.

Received your favor 23rd inst.

By special Delivery mail we send you today a line of samples No. 25 to No. 38 inclusive, equal to which we are ready to make deliveries to you.

We have just satisfactorily completed a 1500 bale delivery of 1912 Choice Hops to one of our Middle West clients. These 1500 bales were on the same line of samples as above sent you.

Faithfully,
E. Clemens Horst Co.,

ECH/J. E. C. Horst."

Thereby Horst Company acted under and confirmed the contract closed by Pabst Company's wire of October 21st.

These fourteen samples 25 to 38 mentioned in this letter of October 29th, were received by Pabst Company on November 2nd, and on November 4, 1912, Pabst Company forwarded night letter to Horst Company reading:

"Cannot accept samples, as they are not according to choice quality specified in contract. We herewith cancel contract for two thousand bales entered with you because of your inability to comply with specifications" (pp. 57, 58).

Under date of November 5th, Horst Company wired that they disagreed with Pabst Company's comments on quality of samples sent and to their statements that Horst Company was unable to comply with contract, and asked Pabst Company to please wire in what respect they claimed samples 25 to 38 inclusive to be below contracted quality, as follows (pp. 58, 59):

"Postal Telegram Company.

Night Lettergram.

San Francisco, Nov. 5, 1912.

Pabst Brewing Co.,
Milwaukee, Wis.

Replying to your yesterday's wire received today we disagree with your comments on quality of samples sent you and to your statement that we are unable to comply with our contracts with you, please wire us in what respects you claim samples twenty five to thirty eight inclusive to be below contracted quality and whether you claim none of all samples sent you is equal contracted quality. Please also wire whether you will pay us decline in market if we consent cancellation two thousand bales sales we cannot release contracts without proper settlement we suggest that our letter October eighteenth offers fairest method of adjusting matter. We are willing submit further samples and are willing that Chief Inspector of San Francisco Chamber of Commerce or other high class competent disinterested parties to be agreed upon shall pass upon quality.

E. Clemens Horst Co.

Charge E.C.H.
137 words."

It will be observed that therein all claim as to "air dried" requirements are abandoned by Horst Company, and that Horst Company base their claim

for damages on the quality of samples 25 to 38 being equal to the type samples 21 to 24.

Under date of November 7, 1912, Pabst Company wired to Horst Company:

> "Samples we sent you represent choice quality cosumnes which our contract specifies and to which none of your samples compare. Our judgment and experience sufficient to warrant our action in cancelling contract because of insufficient quality samples submitted by you. Have partially covered quality at higher than our contract price with you because of our rejection therefore will not entertain suggestion to pay you difference" (p. 59).

The testimony is that samples 21 to 24 submitted by Pabst Company to Horst Company were not "air dried" hops of the peculiar process carried on by Horst Company (p. 275).

The same is true of some of the samples 25 to 38 submitted by Horst to Pabst.

Horst, himself, testified (p. 81):

> "They are not all cosumnes air dried hops. Among them are other hops."

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**THE COURT ERRED BY REJECTING ALL TESTIMONY NOT LIMITED TO "AIR DRIED".**

Horst Company's position announced early in the trial of the case, was that no testimony should be considered except such as pertained to "air dried" Cosumnes hops of the peculiar Horst process and amended its complaint at the commencement of the trial (p. 40) by inserting the words "choice

air dried" before the word hops in all pertinent allegations.

The trial Judge adopted this theory as his own and without any objection being interposed by Horst Company's counsel the trial Judge interrupted Pabst Company's counsel while he was examining his first expert witness as to the price of Cosumnes hops, by ruling as follows (p. 89):

> "Mr. Powers. Q. The agents in turn sell to brewers after they buy do they not?
>
> The Court. You are asking about the price of an article we are not concerned with here at all. You are asking the price of Choice Cosumnes Hops. Now this contract calls for a specific article and you must confine your examination to that. We are dealing here with choice Cosumnes air-dried hops.
>
> Mr. Powers. The intent of the parties as shown all the way through, was that at one time it was air-dried, and the next time they did not say air-dried.
>
> The Court. Both telegrams, if you will read them say air-dried.
>
> Mr. Devlin. They set out the contract in the answer.
>
> The Court. The whole controversy here is over choice air-dried Cosumnes hops. It is my duty to confine the inquiry to the matter that is in controversy here. The jury is not to be distracted by evidence that is not going to effect their judgment.
>
> Mr. Powers. Q. With reference to Cosumnes hops, how are hops in the Cosumnes district dried?
>
> A. By hot air. I have been there on the ground many times."

And with one conspicuous exception the trial Judge adhered to that rule.

During the testimony of the witness Sweeney, the trial Judge required the counsel to confine himself to "air dried" hops, as follows (p. 257):

> "Q. Were you familiar with the value of Cosumnes hops in the year 1912, in the month of November? A. I was.
>
> Mr. DEVLIN. I shall object unless the inquiry be confined to air-dried hops.
>
> The COURT. He does not think that has any significance. I am bound to instruct the jury that it has. It characterizes the class of hops that are called for by this contract. Confine yourself to air-dried hops.
>
> Mr. POWERS. Exception."

Pabst Company took the position that the correspondence carried on in 1911 did not constitute a contract because the minds of the parties had not met; and that the only binding contract between the parties was contained in the series of telegrams and communications carried on in 1912.

The effect of said telegrams was as stated in the instruction offered by Pabst Company and refused by the Court over exception taken before the jury which read as follows (pp. 381-3):

> "It is admitted that on October 15th, 1912, the plaintiff sent to the defendant a night lettergram signed E. Clemens Horst Co., of that date, which has been introduced in evidence; that the defendant replied to it by the telegram, signed Pabst Brewing Co., dated Oct. 21st, 1912, which has been introduced in evidence; that the plaintiff replied to the last mentioned telegram by the letter of Oct. 24th, 1912, signed E. Clemens Horst Co., which has been introduced in evidence. That on Oct. 18th, 1912, the plaintiff wrote to the defendant a letter

signed E. Clemens Horst Co., which has been introduced in evidence; that the defendant replied to the last mentioned letter by letter dated Oct. 23, 1912, signed Pabst Brewing Co., which has been received in evidence and that the defendant replied to the last mentioned letter by letter dated Oct. 29th, 1912, signed E. Clemens Horst Co., C. E. Horst, which has been received in evidence;

I instruct you that any contract which was entered into between the plaintiff and defendant before the exchange of these telegrams between October 15th, 1912, and October 29th, 1912, was modified by the last mentioned correspondence. So that even if there was prior to October 15th, 1912, any contract between the plaintiff and the defendant by which plaintiff was to sell and the defendant was to purchase two thousand bales of hops at the price of twenty cents a pound, plus freight at Milwaukee, or F. O. B. Pacific Coast, yet from and after this correspondence of October, 1912, it became the duty of the plaintiff if it would fulfill its contract to sell and deliver to the defendant two thousand bales of hops equal to the four samples of hops which the defendant had theretofore sent to the plaintiff and it also became the duty of the plaintiff, if it would fulfill its contract to furnish to the plaintiff before shipping or delivering to the defendant any of the said two thousand bales of hops to furnish to the defendant samples of the hops which it proposed to ship, which samples were required to be equal to the said four samples sent by the defendant to the plaintiff and it was the plaintiff's duty to furnish these samples within a reasonable time after October 21st, 1912, and if you find that the plaintiff did furnish to the defendant samples of the hops number 25 to 38 mentioned in the said letter of October 29th, 1912, but that the last mentioned samples were not equal in quality

> to the four samples sent by the defendant to the plaintiff as aforesaid, or if you find that the plaintiff did not within a reasonable time after October 21st, 1912, furnish to the defendant samples of hops equal in quality to the said four samples sent by the defendant to plaintiff then and in either of these events your verdict should be for the defendant."

That Horst Company accepted the offer of a sample contract as a binding contract in lieu of pending negotiations is shown by its acts in forwarding samples 25 to 38 to comply therewith and by their letter of October 29, 1912, referring to the forwarding samples as their offering of hops equal to the type samples after they had received Pabst Company's letter of October 23, 1912, in which Pabst Company confirms their telegram of October 21, 1912, agreeing to accept hops equal to the four type samples.

The practical construction placed on a contract by the parties themselves takes precedence over the literal construction of its terms.

> Mitau v. Roddan, 149 Cal. 14;
> Mayberry v. Alhambra, 125 Cal. 444-446.

The contemporaneous action of the parties shows that Pabst Company on October 10th, 1912, forwarded four samples as a basis for negotiations for a new substituted contract to replace all pending negotiations.

Horst Company accepted this suggested substitute on October 29, 1912, and wrote:

> "By special delivery mail we send you today a line of samples No. 25 to 38 inclusive, equal

to which we are ready to make deliveries to you'' (p. 325).

This made a binding contract on the basis of delivery, equal to the four type samples 21 to 24, as set forth in the rejected instructions just quoted.

> "Tell me," said Lord Chancellor Snyder, "what you have done under a deed, and I will tell you what that deed means."
>
> Keith v. Electrical Eng. Co., 136 Cal. 178-181;
>
> 1 Beach on Modern Laws of Contracts, Sec. 721;
>
> 2 Wharton on Contracts, Sec. 653.

Moreover Mr. Horst testified (p. 110):

> "Q. Did you furnish them samples in 1911 before shipment?
>
> A. I presume I did. I do not know whether I did or not. It was not customary to send samples before shipment of the goods. * * * After I sent the wire to the Pabst people reading, 'If you wire you will accept the hops quality samples you send, we will arrange accumulate such hops for you', I received the four samples marked 21 to 24. Two came in one mail and two came the next day. I subsequently shipped them samples of hops thus marked 25 to 38, that I considered to be in conformity with these four samples of hops."

It will be observed that notwithstanding he testified it was not customary to send samples, that he did send samples.

Hence he must have sent these samples 25 to 38 to comply with the agreement concluded when the

Pabst people wired they would accept hops equal to the samples in compliance with Horst Company's request.

At that time he evidently understood the contract to mean a purchase of 2000 bales of hops "equal" to samples 21 to 24 (which were not "air dried") and hence the deliveries need not have been "air dried" and samples 25 to 38 were not all "air dried".

Counsel for Pabst Company saved many exceptions to rulings refusing to allow testimony as to price and value of Cosumnes hops in November, 1912, because not "air dried" which will be hereinafter set forth in accordance with the rules of this Court.

As a sample we will cite questions asked Mr. Horst (pp. 221-222-223-224):

> "Q. Did you not in the latter part of November, 1912, buy some Cosumnes hops from Wolf Netter & Co.?
>
> Mr. DEVLIN. I object to that as irrelevant, incompetent and immaterial unless it is confined to air dried Cosumnes hops.
>
> The COURT. Yes, I think so.
>
> Mr. POWERS. I will take ruling on that, after I call your attention to the facts. The final telegram between the parties do not refer to air-dried Cosumnes hops.
>
> The COURT. I have watched those carefully. I shall instruct the jury that there was no change in the contract in that respect. The objection is overruled.
>
> Mr. POWERS. Exception.
>
> Exception No. 62.

Mr. Powers. I would like to call your Honor's attention to another fact.

The Court. I have ruled. I have got the whole thing in my head. If I am mistaken you are benefited by it.

Mr. Powers. I will note my exception.

The Court. I want the case to go along. I do not want to go over these things time and time again. I keep these things in my mind as I go along. I will rule on your objections.

Q. Did you buy Cosumnes hops of the same quality as air-dried Cosumnes hops in the latter part of November, 1912?

The Court. That is the same question, exactly. You may ask if he bought air-dried Cosumnes hops.

Mr. Powers. The objection is supposed to be made sustained and I except.

The Court. It is the same objection. I do not require it to be repeated.

Mr. Powers. Exception.

Exception No. 63.

Q. Did you buy hops in San Francisco of a character which was accepted by the trade as Cosumnes hops which could have been used as a delivery on the 4 samples numbered 21 to 24, submitted by the Pabst Brewing Company to you?

Mr. Devlin. I object on the grounds heretofore stated, and on the further ground that it is hypothetical argumentative, and asking the witness to go through a mental process for the purpose of determining whether they would be accepted or not accepted, vague, indefinite and uncertain.

The Court. The objection will be sustained. You will confine yourself to air-dried Cosumnes hops.

Mr. Powers. Exception.

The Court. This plaintiff was not bound to make any purchase of hops that he might imag-

ine would be accepted under his contract, when they were not the hops that were called for by the contract.

Mr. POWERS. It is for the purpose of, showing that while he sold our hops for 14 and 15 cents, that he bought other hops for 17 cents of the same character, and therefore he did not use proper care in the sale of our hops.

The COURT. If you have reference to the same character of hops stipulated for in the contract, I will admit it; otherwise I will not.

Mr. POWERS. It is preliminary, first, that he bought Cosumnes hops, and then I want to show that they were of the same character commercially as air dried.

The COURT. I understand you exactly. I will permit you to show that he bought air-dried Cosumnes hops.

Mr. POWERS. There is no necessity of indulging in any sort of controversy at all about that. I have stated my purpose. May I now renew my objection with the purpose stated, and save my exception. That goes to all the questions.

The COURT. Yes.

Mr. POWERS. Exception."

In addition to the foregoing, the question concerning the propriety of confining testimony to "air dried" hops was raised as follows:

a. Exception to the ruling of the Court instructing counsel not to offer any evidence except as to "air dried" hops.

b. The objection to the notification by the Court to the jury that he would instruct them that they could only take into consideration evidence referring to "air dried" hops.

c. Exceptions reserved to overruling question as to whether or not samples 25 to 38 were all "air dried" hops.

d. Exception to the instructions to the jury that Pabst Company obligated itself to purchase "choice air dried Cosumnes hops".

e. Exception to the instruction of the Court refusing to instruct the jury that any contract which had been entered into between plaintiff and defendant was modified by the correspondence between October 15, 1912, and October 29, 1912, so as to transform it into a contract for purchase of 2000 bales of hops equal to the four type samples of hops.

These will appear hereinafter *in extenso* in our specifications of errors herein.

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AS TO ERROR IN PERMITTING SELF-SERVING TABULATED DEDUCTIONS FROM THE BOOKS WITHOUT INTRODUCING THE BOOKS.

2. The Horst Company's method of carrying on their business, other than filling contracts in existence, was to sell goods through their Chicago and New York offices.

There was a manager in charge of each of these offices.

No books were kept at these offices.

No one who was connected with either of these offices testified.

No attempt was made to take the depositions of any one connected with either of these offices as a participant in its transactions.

No one testified concerning the books of the Horst Company who was familiar with any of the transactions which occurred in the Chicago and New York offices.

Those who did testify were Mr. Horst, the manager and principal owner of the Company, and a special assistant to Mr. Horst.

These witnesses were so highly interested that secondary evidence should have been received from them with great caution.

Moreover, Mr. Horst testified that he commenced to prepare for the trial of this case before the hops in question were picked (p. 135), and Mr. F. G. Ernest Lange, the other witness referred to, described himself as follows:

> "I handled the general office work and special work for Mr. Horst and have been so connected for the last ten years" (p. 142).

He showed so great interest in Horst Company's cause as to require great caution in accepting other than primary evidence from him.

No bookkeeper in the San Francisco office testified.

Mr. Lange testified that men in Chicago and New York made out written reports as to their transactions each day and sent them on to San Francisco

weekly, but he did not claim to know these facts of his own knowledge.

No entry was made in the San Francisco books or any other books of the Horst Company concerning any sale to Pabst Company.

A short time before the trial of the case, and more than a year after the receipt in San Francisco of the so-called written reports from Chicago and New York, Mr. Lange, the said special assistant, computed what he considered to be a proper proportion of the charges for the overhead expenses of the Chicago and New York offices, and applied them to certain so-called 2000 bales of Pabst hops. No one testified to ever having seen any 2000 bales of Pabst hops. No 2000 bales of hops were ever segregated or entered on the books of the company for Pabst Company.

No consideration was given to the sale of the remaining portion of 10,500 bales which Horst Company's San Francisco office had on hand on November 4, 1912 (p. 235), and which the Chicago and New York offices would have sold if they could. Whether they did or not was not possible to be ascertained by Pabst Company because of the manner of introducing the testimony without the books and without any witness who actually knew anything of the actual conduct of the Chicago and New York offices being sworn.

THE COURT ERRED IN REFUSING TO REQUIRE THE BOOKS TO BE INTRODUCED.

3. At the trial of this action the Court of its own motion refused to require the Horst Company to bring its books into Court.

The books were never introduced in evidence.

Pabst Company's attorneys from time to time attempted to get information from the books and were promised the information, which information was never given, and the records will show the statements were made by the Horst Company's witnesses on the witness stand time after time that they could not give the evidence because the books were not present, and although they specially agreed to subsequently furnish the requested evidence, Pabst Company was compelled to let the case go to the jury without the evidence ever having been given.

Not only was the Horst Company permitted to introduce hearsay evidence, but the Pabst Company were absolutely refused the right of cross-examination, not only of the parties who were familiar with the transactions, but because of the absence of the books of the parties who extracted from the books so much thereof as they desired to use in self-serving declarations, except in such a way as to be ineffective.

It must be remembered also that these self-serving tabulations were made under the directions of the owner and manager of Horst Company, who prepared for the trial of this case before the hops were

picked (p. 135), and by a man specially employed by him as assistant and who was not a regular bookkeeper.

Witnesses Lange and Horst were the only persons testifying as to the sales price and costs and expenses for sales. Their testimony was based upon written reports made by unknown persons who were never sworn or cross-examined.

The jury never saw the books.

Pabst Company's representatives only saw such books as Horst Company were willing to show them.

The witness Lange drew deductions from the written reports that the prices made were "coast prices," or prices where the purchaser agreed to pay for cost of delivery. He made tabulations as to expenses of collecting accounts from purchasers who had not paid for their goods in various cities throughout the East, and charged Pabst Company's account with certain accounts which he claimed to be uncollectable.

Mr. Horst selected such sales as he elected in 1914 to claim belonged to the Pabst Company's 2000 bales of hops. Bookkeeping Assistant Lange figured storage and interest on these particular goods.

Now these entries were taken from books where witnesses Horst and Lange testified that many of the entries were not accurate; and were not intended to be accurate; that the dates of shipments were approximate dates; that the entries that the goods had been shipped were not correct, but that

said goods were on hand and remained on hand for several months after the dates of the entries. The entire circumstances surrounding these books were that of suspicion of their use for the purpose of helping Horst maintain a case that he began to prepare before the hops were picked.

The two witnesses who knew about the facts which were introduced in evidence, to-wit, the managers of the Chicago and New York offices, were not sworn.

No explanation was made why they were not produced.

Zipfel who had charge of the entries of the movements of hops in the stock-book was sworn and examined as an expert but not as to his entries in the stock-book.

The bookkeeper who had charge of the San Francisco books was not sworn, and no explanation was made why he was not produced.

No excuse whatsoever was given why the primary evidence of the parties who knew of the transactions was not offered.

The secondary evidence itself, to-wit, the books themselves were not offered in evidence.

The Court specifically instructing the Horst Company that they need not produce their books over the demand of the Pabst Company that the books be produced and objecting to any evidence other than the books.

Their safeguard by way of cross-examination of witnesses who were familiar with the transactions was taken away from the Pabst Company and they were even curtailed in their cross-examination of the specially selected bookkeeping assistant as to compilations made by him because of the fact that it used up too much of the Court's time (pp. 197-239), notwithstanding the fact that this bookkeeping assistant said it took him five or six days to make up his tabulations and selections from the San Francisco books of such entries as he saw fit to consider were connected with the so-called Pabst hops.

The record shows that witnesses Horst and Lange were recalled several times during the trial so that the witnesses might furnish data and that the data would not be furnished because the witnesses would claim that the information could only be obtained by a long series of investigations which generally the Court would not permit because of lack of time.

The burden of proof of Horst Company's case was thus transferred to a requirement that Pabst Company prove the negative without knowledge even of the name of the persons who carried on the primary transactions in question.

At pages 75 and 76 the following rulings were made to questions asked witness Horst, who had testified that it took a long time to sell the goods and in selling they incurred traveling expenses, insurance and brokerage.

> "Q. What was the amount taken from your books?

Mr. POWERS. The books are the best evidence.

Mr. DEVLIN. If you want the books we will bring them here. The books could be brought into Court, but it would take a great deal of time.

Mr. POWERS. I would prefer to examine the books in the ordinary way.

The COURT. They do not need to be brought here. Counsel may have an opportunity of examining these different items.

WITNESS. I am personally familiar with the several items outside of the books. I have made extracts from the books in a tabulated form.

Please produce it.

Mr. POWERS. We object on the ground that it is irrelevant, incompetent and immaterial, a self-serving declaration, made by the party himself, and the books themselves are the best evidence.

The COURT. The books are the best evidence, but he has a right to testify to the result derived from an examination of these books. You may verify them on cross-examination after having had an opportunity to examine the books.

Mr. POWERS. Exception.

Exception No. 10."

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**HORST COMPANY'S BOOKS NOT KEPT IN A SUFFICIENTLY ACCURATE MANNER TO WARRANT THEIR ACCEPTANCE AS EVIDENCE.**

Moreover, the testimony of Lange and Horst shows that the San Francisco books of Horst Company were not intended to be accurate records of the transactions in many instances and that the

entries of the so-called weekly vouchers were not made regularly and the bookkeeper keeping the books did not testify.

The witnesses testified that none of the reports were made as a charge against Pabst Company that was entered in the books.

Hence the reports were hearsay to the witnesses.

The reports were made by the managers of the Chicago and New York offices—both of these men could have been produced as witnesses.

Had they been produced Pabst Company could have cross-examined them as to the connection of each item of expense with Pabst goods, with the other Horst goods, with Horst Company's future business and with the plan to hold business in the future and the like.

No effort was made to take their depositions.

Lange testified that the Pabst Company were considered to have 2000 bales by selections made by him a short time before the trial of the case and Mr. Horst testified to the sale of said so-called Pabst 2000 bales by giving the sale price of 1506 bales "air dried" hops sold by Horst Company after November 4, 1912, and by treating sales of 494 bales delivered at various times before and after November 4, 1912, on certain contracts in existence with other customers on November 4, 1912. There were 1062 bales of "air dried" hops sold during the same period to other customers having similar contracts and there

were 2536 bales of other hops sold by Horst Company after November 4, 1912, making a total of 3882 bales (p. 192). These 3062 bales were included in the total of 10,500 bales of hops which were in the hands of Horst Company for sale on November 4, 1912 (p. 235). The expenses of the Chicago and New York offices from November 4, 1912, to July 1, 1913, were used by Lange (p. 197) as being overhead for the sale of these 3882 bales, and the same was divided in the proportion of $\frac{1346}{3882}$ to Pabst Company and $\frac{2536}{3882}$ to Horst Company, or proportionately $4459.30 for Pabst Company's 1346 bales.

In this computation no account whatsoever is taken of efforts on the part of the New York and Chicago offices to help sell so much of the 10,500 bales on hand in San Francisco, but not included in 3882 bales assumed to be sold by them.

Lange testified that 494 bales of hops had been used by Horst Company to fill contracts in existence with other customers on November 4, 1912.

The bookkeeping assistant Lange, testified to many entries in the books which he knew to be wrong.

The very fundamental fact about which Lange testified, to wit, the total number of bales of hops which were the subject of the so-called overhead from November 4, 1912, to July 1, 1913, was never at any time established at a definite figure.

In fact, it was given at two different figures—sometimes at 1346 bales and sometimes at 1503

bales. The books subsequently introduced show both figures are wrong and that the true amount was an entirely different figure, to wit, 1336 bales.

These figures are shown at the following pages.

In the early days of Mr. Lange's testimony he referred to the overhead being charged to Pabst Company on the basis of 1346 (p. 154), i. e., to a question asked him by Mr. Devlin:

> "And the percentage that would apply to the 2000 bales you arrive at simply by figuring?" He answered: "The percentage that would apply to the 1346 bales."

The Court said, on the same page:

> "The only means, then, by which you arrive at these figures, is by taking a certain percentage of the overhead charge in proportion of the number of pounds of hops sold, the 1346 bales, and you take the proportion of the 1346 bales to the entire amount of business transactions, or the volume of business during the period in which you were engaged in selling these 1346 bales."

At page 192 Lange testified, when asked the question:

> "What was the gross amount of the business done in Chicago and New York offices from November 4, 1912, to July 1, 1913?" by answering 3882 bales."

On page 183 he testified to question asked him:

> "What other goods were being sold by the New York office at that time besides these 3062 Cosumnes hops?" by answering: "A total of 2536 bales."

But when Mr. Horst subsequently discovered that 1346 bales, added to the 494 bales that were allotted to prior contracts as Pabst goods, or even the 497 bales which were testified to at other times (and the inaccuracy as to these two amounts is equally glaring), Mr. Horst testified in the later days of the trial (p. 243) to question asked by Mr. Devlin as follows:

> "After November 4, 1912, how many of these bales of hops that you call choice air-dried Cosumnes hops, did you sell? Answer: "1503 bales. In my statement I gave Pabst credit for some 500 bales that were sold on prior contracts."

This testimony was given after Mr. Lange had been cross-examined for several days.

Certainly, witnesses who examine books and report deductions therefrom, showing as simple an item as the number of air-dried Cosumnes hops sold between November 4, 1912, and July 1, 1913, who make the positive statements that the books show 1346 bales at one time, and 1503 bales at another, should have their testimony as to the other deductions from those books viewed with great distrust.

*Now, both these figures were wrong.*

By continuous persistence on the part of the attorneys for Pabst Company, despite the numerous failures to keep promises as to facts from books by the Horst witnesses, said attorneys were able to force the introduction of the sales book

in evidence, and on the very last day of the trial they had their expert assistant testify as to his addition from the entries in this sales book; he testified that he had checked up the sales of Cosumnes hops for 1912 and "added up the number of bales that were shown in this book as having been sold on dates prior to November, 1912; they amounted to 2764 bales" (p. 365).

It will be observed also that *no person on behalf of Rabst Company contradicted this computation from the actual books.*

Now the testimony is, that the total number of air-dried Cosumnes hops manufactured that year, with the exception of pick-ups, was somewhere between 4000 and 4300 bales.

(This discrepancy as to the total number of bales will be pointed out hereafter as a further evidence of the inaccurate manner of keeping these so-called books.)

For the purpose of this discussion we will take the figures of the witness Conrad who had charge of the picking and who testified (p. 136):

> "I have charge of the picking of the 1911 and 1912 crop. * * * We baled 4300 bales that year, of which 200 bales were clean-ups. It made them 4100 bales better because we took out the clean-ups. The hops were air-dried."

If we deduct from this 4100 bales, the number of bales sold prior to November 4, 1912, we will have the number of bales of hops which should

have been on hand, if the books are correct, to wit, 1336 bales.

Consequently we have from the testimony the following figures as to the number of bales on hand on November 4, 1912; Mr. Lange (p. 154), 1346. Mr. Horst (p. 243), 1503, and the books when introduced show 1336.

Mr. Horst testified (p. 242) that the total number of bales air-dried on hand on November 4, 1912, was 3062 bales, and at page 114 he testified: "I had 2900 bales at the time the Pabst people defaulted", another discrepancy of 162 bales.

At page 243 he testified:

> "The other 1062 bales were delivered on contracts on which we had already made a profit because of decline in the market on November 4th."

The absolute impossibility of a Court accepting deductions from such witnesses, from such books, without any testimony of any person who was connected with any of the transactions, itself shows the extreme danger of departing from the rules of evidence, and the extremely prejudicial character of the error in allowing deductions from books not in evidence.

Again to show another discrepancy, take the matter of the total number of bales of air-dried Cosumnes hops produced in 1912.

Mr. Horst testified (p. 55):

> "We raised something over 4500 bales that year. * * * There was about 150 bales

of clean-ups and about 4350 bales of choice hops."

As has already been shown, Mr. Conrad, the man in charge of the picking, testified that they baled 4300 bales that year, of which 200 bales were clean-ups, and that had made the 4100 bales better because of the clean-ups.

Again to show another discrepancy:

Mr. Lange testified (p. 155), on direct examination, "There were 497 bales sold on prior contract" and Mr. Devlin used the same figure in asking a question, on page 156.

A few days later, Lange changed his testimony, while being cross-examined by Mr. Powers (at page 182) by making 494 bales apply to contracts already in existence, and when Mr. Powers attempted to pin him down to the exact statement of facts as to when the 1062 bales were delivered on contracts not allotted to Pabst, he took refuge behind the usual statement that he would get a tabulation of it.

But that tabulation was never produced.

And never at any time did Mr. Horst or Mr. Lange give the dates when the 494 bales or 497 bales were actually delivered.

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**THE BOOKS WERE NOT INTENDED BY HORST COMPANY TO BE ACCURATE RECORDS OF THE TRANSACTIONS.**

Lange testified that of these 494 bales segregated for Pabst Company, 20 of them had been already sold to a man named Hohenadel (p. 266).

The sales book itself shows that the Hohenadel sale was made August 23, 1913 (p. 267). The shipments were in February and March, with October 11th stricken out. That was lot 518; and at (p. 227) Mr. Horst testified that the Hohenadel sales, October 12th, 30 bales from 518 and the sales book entries show no sale to Hohenadel on October 12th (p. 264). The Court asked the question:

> "The COURT. Here is 30 bales that were shipped to the order of E. Clemens Horst Company, New York, notify John Hohenadel. Now, counsel, and not without reason, asked you why those 30 bales were noted here 'Notify John Hohenadel,' and he asks you if that would indicate that the sale had been arranged prior to November 4th.
>
> A. That is a part of the 494 bales that we sold previous to November 4th. It was not a part of the 1503 bales."

And at page 263 he testified:

> *"That entry does not mean that we sold them to Hohenadel. It means that we were shipping to ourselves. Notify him.*
>
> Q. It was shipped to him October 5th?
>
> A. *Yes, exactly. It was not shipped to him. It was shipped to ourselves."*

He specifically testified that no entries were made as against Pabst Company in the books from which he gathered the data for instance at page 265, he testified:

> "We knew the lot numbers of those, and we knew the lot numbers of the 3062 bales on hand November 4th, so it was a very simple matter, having that information, to *take out the 2000 bales,* delivered after November 4th, *on account of Pabst."*

Mr. Lange also testified to many things showing that the books were inaccurate and not intended to be kept up with current business.

The question was asked (p. 194):

"Will you give me the amount of the general expense for the office for the month of July, 1913, and then we can see how they differed from the month of June.

A. I would have to go to San Francisco, and it will take possibly a couple of days to get it" (p. 196).

"Q. You cannot, then, give us from your original records where the 2000 bales, or the 1346 bales that were set aside, that were sold for the Pabst Brewing Company account were stored on November 4, 1912.

"A. I do not have it here. *That is in several books* and it would take some time to point that out to you, but I can do so.

Q. Will you give me the figures from which you get that overhead charge?

The COURT. You cannot spend that indefinite time on items like that. I think you have exhausted the subject.

Q. I have not asked about this 2536 bales that forms the other factor. I want to know how to check up the accuracy of that amount. Where did you get that 2536 bales?

A. The sales book.

Q. Is that salesbook available to be examined?

A. No, sir, it is not here. This is the book I was speaking about this morning."

Also page 225:

"Also all hops originally were on the ranch and then my books show the date that the hops were ordered out.

A. I cannot give you the dates when they were stored. When they were harvested, they were on the ranch, and the harvesting ran from the beginning of August until the beginning of September as soon as they were baled.

WITNESS. *The dates here are going to be kind of mixed up in the respective lot numbers.*"

Mr. Horst testified (p. 228):

"I will have to go over this list and see because these figures do not total up 4500 bales. *A lot of the stock does not ever reach this stock-book.* The entries were made in this book on pages 211 and 212, about the time that these stock movements were made, by Mr. Zipel. * * * *Some of the lots of Cosumnes do not ever go into the stock-books,* if they go out directly they are not in the stock-book, and they do not go on this page of stock on hand. When hops are baled out and shipped without ever being held on the ranch, that is stock moved out right away."

It will also be noted that Mr. Zipel was a witness but did not testify as to the books.

Again (p. 229):

"Q. Show me an entry as to where the other goods went out, other than the other goods you have given us here.

WITNESS. I can give you this information as well as anybody else. Joseph Schlitz Brewing Company, 100, lot 542, on August 30th. *That does not necessarily mean the day that it was shipped. It simply means the day we expected to ship them.*"

Again (p. 234):

"We have certain goods on hand that we ship out at approximate dates. November 4th,

*on these are approximate dates.* The total amount of goods is shown by the book. *The hops would be in our hands long after these dates, that I have given you.*

The COURT. What do you mean by approximate dates?

A. These are the dates when the entries are made. When we hear of a shipment being moved, a lot of hops being moved, from one ranch to the buyer, or any hops being shipped to a buyer, then we enter it up of that date, as of that date. *Many of these lots there will be entered up as of a certain date, and they will be on hand after date.*"

It must be very evident that these books were not intended to be accurate records of current transactions as they occurred.

It will be noted that after the recalling many times of Mr. Horst and Mr. Lange and the Court refusing to allow further cross-examination, Mr. Horst agreed (p. 237) as follows:

"Q. If you will give me a list of the hops that were made to fill the contracts that you then had in existence, I will be obliged to you.

A. I will pick that out for you.

Q. What reshipments were made by you of Cosumnes air-dried hops after they left the coast?

A. I will pick that out for you from the book.

Q. Will you give me a list of such of the contracts as were filled by Cosumnes hops prior to November 4th, 1912?

A. Yes.

Q. I want the dates and the amounts.

A. All right."

But Pabst Company was compelled to close its case without this list.

Mr. Horst also testified (p. 241):

> "The list of sales that went through the New York office were *compiled* from our San Francisco books.
>
> Q. What record shows that the Cantiler Brewing Company bought 20 bales through the New York office?
>
> A. Those are sales not only in New York, but New York, Chicago, San Francisco and all other places. The New York office did not have sales sheets. We do not keep any New York books. *This record is made from communications that come here from the New York office.*"

Again at page 245:

> "Q. You were to look up and see whether there was any reduction in price to these breweries because of rejection of Cosumnes hops in 1912, did you do so?
>
> A. I have not been able to get at that yet."

Again:

> "Q. What allotment had been to these various contracts when the Pabst contract was breached, according to your theory, November 4th, 1912? Kindly give us the amount that the 1062 bales finally sold for.
>
> WITNESS. Yes, I will have to make up that statement for you. I will be pleased to make it up for you."

But he never did.

When Horst Company desired to cross-examine concerning testimony of Lange taken from the books, they were left to the mercy of manager Horst, who

prepared this case from the time they commenced to pick the hops and his assistant Lange, because the Court overruled the objection to testimony from the books without requiring the books to be introduced in evidence. And without the books no proper cross-examination of Lange was possible.

Again bookkeeping assistant Lange testified:

"Q. And that period has not expired? (p. 186).

A. No, sir. I would not say that there was a contract as to the length of time, but there was an agreement as to his salary. *I do not know whether there was a stated salary.* The salary of $500 continued about three of the months after November, 1912; January, February and March, 1913, the salary was $500.00. In November and December he got $350.00. I do not know why the salary was raised. The number of bales of Cosumnes hops on hand December, 1912, was 1246. *I do not know where Pabst goods were at that time.*

Q. Can you find out for us?

A. Yes.

The COURT. What is the materiality of this?

Mr. POWERS. There are certain freight charges that are made on these goods. Our understanding is that they were shipped from one place to another. I want to check them over.

Q. On January 1st, 1913, how many Pabst goods were on hand unsold?

The COURT. I regard this as very immaterial, unless you show me that it is material.

Mr. POWERS. They raised the salary of the New York man when the amount of goods was less to be sold, and it shows that there was no connection whatsoever between the amount of Pabst goods to be sold and the expenses.

The COURT. That does not make any difference. A man transacts his business in a certain

way. There comes a time when he feels that an employee's services are worth an increase in salary. Now the particular condition of the business with reference to any one transaction is wholly immaterial. It is immaterial as relating to a particular transaction except in so far as it may properly be charged to the proportional amount of the entire expenses of that transaction. I cannot permit you to go into this in such minute detail."

Again (p. 192):

"Q. What was the gross amount of the business done in the Chicago and New York offices from November 4th, 1912, to July 1st, 1913?

A. 3,882 bales of hops.

Q. How much of the expense incurred was incurred for the purpose of maintaining that establishment and having it ready to do business the following year?

A. *I do not know.*

Q. How much of it was incurred to finish up business that had been inaugurated prior to November 4th, 1912?

A. *I could not say.*

Q. How much of it was incurred because of contracts that were in existence on November 4th, 1912, and had to be carried out because of the existence of those contracts?

A. I do not know that there was any. The New York offices rented and it is necessary to maintain an office prior to November 4th, 1912, and thereafter.

Q. It is a costly matter to assemble an office force, is it not?

Mr. DEVLIN. This is objected to as hypothetical, vague, indefinite and uncertain.

Mr. POWERS. To show that a portion of this expense was for the purpose of preventing the office force from being disseminated and thereafter got together, and that there has been no

allowance for that purpose, I am showing that the method of computation is wrong. I am trying to do that if I can. A portion of this expense should be charged generally to up-keep, and not to these two lots of hops that were on hand at the time is my theory.

The witness has testified that there was a certain number of hops on hand. He has divided the hops into two lots. The Pabst lot and those which were not the Pabst lot. He has proportionated the expense of the selling of those two lots among two offices without taking into consideration the fact that a part of that expense was due to the general up-keep of the business. I am trying to show that it is not a fair way of proportioning that expense, because a certain portion of it was necessary for the holding of the office together, keeping it from being separated, and then having to pull it together again for next year's business.

The COURT. I do not think that is tenable.

Mr. POWERS. Exception."

* * * * *

Again (p. 194):

"Q. Will you give me the amount of the general expenses for the office for the month of July, 1913, and then we can see how they differed from the month of June.

The COURT. I do not think it will be material if it were here, to tell you the truth, Mr. Powers.

Mr. POWERS. I will take your Honor's ruling on it.

The COURT. If you are going to get it here, then I will rule on it. I do not believe it would be material.

A. I would have to go to San Francisco, and it would take possibly a couple of days to get it.

Q. Have you got the report of the warehouse holdings during the month of November, De-

cember, January, etc., to July, so far as they affect the Pabst goods.

A. I have not that.

Q. When can we have that?

A. I believe I can get it for you to-night."

* * * * *

Again (p. 195):

"Q. We want to know which of these goods have been rejected, and whether or not the Pabst people were given goods that had been rejected, and the 1000 bales that were not given to Pabst were goods that had been rejected. I want to know the history of each of the bales you designate as Pabst goods. For that reason I will want to know where they were stored. I move that all of the evidence of the witness with reference to overhead charges be stricken out on the ground that it is dependent upon items that are not shown to be in any manner connected with the Pabst Brewing Company's goods, or the goods that Horst set aside for the Pabst Brewing Company, or designated to fill the order of the Pabst Brewing Company, and that it is based upon hearsay evidence of expenses by the other parties, and is immaterial and irrelevant, also a conclusion of the witness as to the particular amount to be charged, based upon matters that lie partly in law and partly in facts, and also calling for the opinion of the witness.

The Court. The motion is denied.

Mr. Powers. Exception.

Exception No. 57."

(p. 196) "Q. You cannot, then, give us from your original records where the 2000 bales, or the 1346 bales that were set aside—that were sold for the Pabst Brewing Company account, were stored on November 4th, 1912?

A. *I do not have it here. That is in several books and it would take some time to point that out to you, but I can do so.*

Mr. Powers. That is the principal thing I have been asking for for three days.

The Court. You want to be able to verify the fact that they were all Cosumnes hops?

Mr. Powers. Yes. And our information is that some of these had been rejected, taken back and sold to different people. We want to be able to find out whether the 2000 bales that were set aside by Horst were rejected goods or not. We want to follow the goods from their origin to their place of departure. I want that so I can continue my cross-examination of Mr. Horst at as early a date as possible.

Q. Will you give me the figures from which you get that overhead charge?

The Court. *You cannot spend that indefinite time on items like that. I think you have exhausted the subject.*

Q. I have not asked about this 2536 bales that forms the other factor. I want to know how to check up the accuracy of that amount. Where did you get that 2536 bales?

A. The sales book.

Q. Is that sales book available to be examined?

A. No, sir, it is not here. This is the book I was speaking about this morning.

Mr. Devlin. We will get it for you as long as you want it."

* * * * * *

Again:

"On November 4th, 1912, we had three thousand odd bales Cosumnes hops on hand.

Q. State where they were.

A. *I cannot state from memory. I can give you the data.*

Mr. POWERS. I move to strike out the testimony of the witnesses with reference to the existence of 2000 bales at that time because he was referring to records and the records were not produced.

The COURT. The motion will be denied.

Mr. POWERS. Exception.

Exception No. 61."

* * * * * *

TESTIMONY OF F. G. ERNEST LANGE.

Again (p. 258):

"Q. You said you were familiar with the entries that appear in the books. Will you kindly show me where those 2000 bales of hops are charged in your books to the account of Pabst & Company?

A. *They are not charged to Pabst & Company.*

Q. Now, you say that there were a certain 2,000 bales of hops on November 4th, 1912, in certain warehouses. Will you show me the record of the whereabouts of those bales on November 4th, 1912?

A. I can show you some of the records. *They are in several books. We did not bring them all here.* I started out to do that with Mr. Farrell."

* * * * * *

Again (pp. 259, 260):

"Q. You furnished the Court a statement from a list of entries, a list of the bales that were in various warehouses. Show me where you got that list of bales from?

A. *It is impossible to show now. They are in several books, and it would take at least a week to show them all to you.*

Q. Show me one of them. Produce the exhibit that was filed here yesterday. You say there were 300 bales in Milwaukee. Will you kindly point out in the books where those 300 bales in Milwaukee were stored?"

Again (pp. 260, 261, 262, 263):

"Q. Now, what date did those bales leave that warehouse?

A. I wish to amend the dates on that other one. I had the Milwaukee page. This is the warehouse company's actual page. Lot 464 was not in the warehouse. The only lots in the warehouse were, October 31st, 100 bales, lot 461; October 31st, 100 bales, lot 462; and October 31st, lot 465. They left the warehouse, 100 bales, lot 461, December 30th; 100 bales, lot 462, December 30th; 25 bales, lot 465, December 10th; 75 bales, lot 465, December 30th; *I wish to say that these dates are only approximate dates.* They are not the dates *they left the warehouse.* They are the dates shown in this book they left the warehouse, but those are not the correct dates. They are only approximate dates.

Q. *Where can we find the correct dates?*

A. *By looking through a great many files in San Francisco.*

The COURT. Now, Mr. Powers, tell me what the materiality of the particular date is when they left these warehouses?

Mr. POWERS. They came in October, and if on November 4th, 2000 bales of them had gone out, there would not be 2000 bales on hand, and the method of computing the loss, if any, would be on a different basis.

Q. Show me where the 208 bales which were in Chicago on November 4th, 1912.

A. I cannot show by this book where those hops were, that is on November 4th, without referring to a great many entries. We have

a great many entries in this book that are made prior to delivery, or prior to shipment, and some of them subsequent.

Q. How does it come that they were entered in that way?

A. Mr. Horst explained it in his testimony the other day.

Q. I know he did, but I want you to explain.

A. We order out hops from San Francisco on shipping instructions. Those shipping instructions are entered in this book. We might order out hops a month or so before they go out of the warehouse, and the date that they were ordered out is shown in this book.

The COURT. Explain how that comes about, that they remain there so long after.

A. Our business is all handled from San Francisco and these lots are in the East. We make an order of shipment. Our instructions are to ship, and there is a line for a certain time and we order those hops to go out, and they may go out on shipments two weeks from now. We make an entry in the stock book the date we order them out.

Q. *Would it be possible for a representative, like Mr. Farrell, to take this book and check them over?*

A. *No, sir, it would not. The same things holds good as to the 404 bales in New York.*

Q. Show me where the entries are in the books.

A. I could not show you from this book.

Mr. POWERS. I move to strike out the testimony with reference to Chicago and New York goods unless some entry is shown where they are contained in the books.

The COURT. That is not the proper way to reach it. I will deny that motion.

Mr. POWERS. Exception.

Exception No. 80."

Again (pp. 265, 266):

"Q. (To Witness) How are you able to make up this paper headed, 'The location of 2000 bales of Cosumnes hops, November 4th, 1912'?

A. Because we knew 1503 bales were sold after November 4th, of which 497 bales of hops on previous sales were delivered after November 4th on such previous sales. We knew the lot numbers of those, and we knew the lot numbers of the 3062 bales on hand November 4th, so it was a very simple matter, having that information, to take out the 2000 bales, delivered after November 4th, on the account of Pabst.

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NOBODY BUT THE BOOKKEEPING ASSISTANT WAS ABLE TO FIND FROM THE BOOKS WHICH ENTRIES APPLY TO PABST GOODS.

Nothing was done, no entry made in the books, or mark made on the bales themselves to indicate which were the Pabst and which were the Horst hops used in these contracts.

None of the 494 bales allotted to Horst were used on contracts where prices were in excess of twenty cents. The Court refused to allow us to ascertain the prices which were obtained for the 1062 bales allotted to Horst on these contracts although Mr. Horst volunteered that some went as high as twenty-six cents.

There was no attempt on the part of the Horst Company to prove the manner of keeping their books; they testified they kept none in New York and Chicago; they did not attempt to prove any entry therein as to sales or expenditures in the

Chicago and New York offices nor to prove any fact concerning the transactions themselves by any person who pretended to know anything about the transactions themselves.

Only such vouchers as their bookkeeping assistant saw fit to introduce were introduced.

At the end of February, 1912, the hops were practically all sold (p. 79). On May 1, 1913, there were 34 bales on hand and on June 1st, there were 16 bales on hand (p. 183).

Thirty-four bales amounted to 6800 pounds. Horst swore these were worth 12¢ a pound. In other words, while there was $816 worth of Pabst goods on hand establishments were being maintained where rent for the New York office was $100 and one man was paid a salary of $500 per month and another man was paid a salary of $350 per month to sell them, when they could have been sold by paying from ½ to 2% commission, the Court allowed the expenses for these months to be used as a part of the overhead charges charged proportionately to the Pabst Company's goods and refused to allow the question:

> "Was it necessary to maintain an office in New York with a manager's salary at the sum of $500.00 a month in order to sell 16 bales of Cosumnes hops?" (p. 184).

With reference to the salary of the manager of the New York office, Mr. Lange testified:

> "in November and December 1912, he got $350 and in January, February and March, 1913,

the salary was $500. I do not know why the salary was raised. The number of bales of Cosumnes hops on hand December 1912, was 1246. I do not know where the Pabst goods were at that time" (p. 186).

Also

"the salary of the manager of the Chicago office was $350 and he had an assistant whose salary from November to July was $975" (p. 187).

Question was asked:

"What services, if any, did the stenographer perform with reference to the Pabst goods if you know of your own knowledge?

A. You are segregating an item according to the Pabst goods when all of the services were rendered for all of the goods that were sold at that time.

Mr. POWERS. I move the answer be stricken out as not responsive to the question.

The COURT. Motion denied.

Exception, (p. 188).

Q. You do not know what services he performed, if any with reference to the sale of the Pabst goods at that time?

The COURT. It would not make a particle of difference.

Mr. POWERS. I want to get a few of these items. With reference to the various items that go to make up the $37.50, for instance, exchange, December 31st, seventy-five; stamps for office $4.00. You have no means of knowing what those stamps were used for, or what that exchange was for, of your own knowledge?

A. As far as I am concerned, I was not there watching the stamps go out, but I can say what the stamps were probably used for.

Q. You do not know of your own knowledge?

The COURT. They may have rolled them up and made cigars out of them.

A. I do not know. That is the regular office expense (p. 188).

* * * * * * *

Q. Of your own knowledge you do not know what they were for, the expense of the stamps? (p. 189).

A. I do not know.

The COURT. I presume that you are asking these questions for the purpose of moving to strike this out on the ground that he is testifying to hearsay?

Mr. POWERS. Yes.

The COURT. The motion is denied.

Q. Your answer would be the same as far as all of the other items are concerned of the New York office, would it not?

A. *In reference to my knowledge of them. I knew nothing about them other than these are expenses for running the New York offices. These are the expenses we paid to our men, and they came to us and we entered them in our books.*

Q. But whether any portion of those expenses were applied towards the sale of the Pabst goods, or directed towards the sale of other goods, you do not know.

A. They were directed against the sale of the Pabst goods and other goods, whatever hops we had to sell at that time.

Q. Do you personally know what was done with reference to whether there was any segregation or not of any portion of those expenses for those particular Pabst goods or not?

There are certain traveling expenses of trips taken in those vouchers, are there not? (p. 190).

A. Yes, there are. Here is one for $11.20 for hotel bills, meals, fare, car fare, public

stenographer and berth for Mr. Fleger from Boston, Mass., to Providence, Rhode Island, and New York City.

Q. You do not know what services were performed during that trip by Mr. Fleger?

A. No, sir, I was not with him.

Q. You do not know in what manner, if at all, his services were connected with the Pabst goods?

A. Mr. Fleger is one of our salesmen and was endeavoring to sell hops. During the entire period that he was with us he was trying to sell hops. The Pabst hops were a part of the hops that we were trying to sell.

Q. *You do not know of your own personal knowledge whether Mr. Fleger went on that trip, and whether it was taken in connection with the Pabst goods or not?*

A. *No, he may have gone fishing for all I know.*

Q. *All you know about it is that it was entered in your books as a part of the expense of selling hops?*

A. *That is all I know about it.*

The COURT. *All of your testimony with reference to these transactions during that period, regarding expenses of these eastern offices, is being given simply as a result of your examination of the books?*

A. *Entirely.*

Mr. POWERS. I move to strike out all of the testimony of the witness as to overhead expenses on the ground that the evidence on which it is based is hearsay.

The COURT. The motion is denied'' (p. 191).

Bookkeeping assistant Lange testified that he *examined the books* for the purpose of ascertaining the price at which the 2000 bales sold to Pabst Company were sold and that he examined all vouchers

and memorandum of sales sent on by the agents selling them and that he had figured out interest, insurance, storage, freight and tare, discount and losses by bad debts.

These were all introduced over the objection of Pabst Company as follows:

(a) That the books were the best evidence.

(b) That is called for conclusions of law, and

(c) That it took for granted that there were a certain 2000 bales sold to Pabst Company and segregated by them without there being any evidence as to the said 2000 bales being set aside.

(d) That it was hearsay evidence.

After the Court had asked him certain questions, he overuled the objection.

The testimony on which the Court based its ruling was as follows (p. 153):

> "How are you able to know that these expenses relate to these hops that you are testifying about.
>
> A. On the 2000 bales?
>
> Q. Yes.
>
> A. They refer to all the hops sold by the offices during that period.
>
> Q. And the overhead expense relates to any other business transaction during that period, and you are apportioning them up?
>
> A. The amount sold by the other offices the total amount of bales of hops sold during that period.
>
> Q. And the percentage that would apply to the 2,000 bales you arrive at simply by figuring?

A. The percentage that would apply to the 1346 bales.

The COURT. The only means, then, by which you arrive at these figures is by taking a certain percentage of the overhead charge in proportion to the number of pounds of hops sold, the 1346 bales, and you take the proportion of the 1346 bales to the entire amount of business transactions, or the volume of business, during the period that you were engaged in selling those 1346 bales?

A. The entire transactions, the volume of business done through those offices. These costs refer to those offices only.

The COURT. I do not think that is admissible (p. 155).

Mr. DEVLIN. Let me make it a little plainer. Some of the hops of the 2000 bales were sold in San Francisco, 200 bales or so.

A. Yes. There is no charge made for that at all.

Q. There were certain number of those bales, about 500 and odd, that were sold on prior contracts?

A. *There were 497 bales sold on prior contracts and we have not made any overhead expenses on them.*

Q. Beginning on November 4th, 1912, until you finished selling the remainder of the bales, about 1300 and some odd bales, were there certain expenses incurred in New York and Chicago and eastern states in selling the remainder of the 2,000 bales of what we call the Pabst hops and other hops?

Mr. POWERS. I object to that as hearsay.

The COURT. Objection overruled.

Mr. POWERS. Exception.

A. Yes, sir. That appears on the books of the company. We have not charged our own commission for selling the hops."

At p. 156, he testified:

"I am familiar with the delivery of these hops to eastern agents after November 4th, until the last of those we call the Pabst hops were sold. The statement showing hops on hand I got from the books. I made an examination for the purpose of ascertaining the amount of hops of the 1912 growth at the Cosumnes ranch on hand in November, 1912, and the amount sold. The number of bales of hops in 1912 that were on hand on the Cosumnes ranch on November 4th, 1912, was 3,062 bales. Some of them were at the Cosumnes ranch in our warehouses; some of them en route to the east; some of them were at Milwaukee and some of them at Chicago and some of them at New York. I have charge of the stock room and the books, and I know the stock that goes out and where it goes to, and I know where the 2000 bales of hops were sold, *and that afterwards returns were made by our agents stating where they were sold and the prices that they obtained, and I know the salaries that were paid to our salesmen during that time, from the books,* and I know the expenses that were incurred.

Q. And they related to the 2,000 bales of hops, and also to the other hops?

Mr. POWERS. I object to that as being hearsay.

The COURT. Objection overruled.

Mr. POWERS. Exception.

Exception No. 41.

The COURT. You know that in the ordinary course of business?

A. Yes.

Mr. POWERS. Exception.

Q. And did the corporation E. Clemens Horst Company pay these expenses and these salaries, based upon those statements?

A. Yes. They were paid before this suit was commenced in the ordinary and usual course of business.

Mr. Devlin. I will take your Honor's ruling now, if you think it is not proper.

The Court. With this explanation I think it is quite proper.

Mr. Powers. Exception.

Exception No. 43 (p. 158).

Q. Did you make a calculation, without giving it now, as to the proportion of the expense these 1300 bales bore to the total expense, that you have just described?

Mr. Powers. I object to it as irrelevant, and immaterial, calling for the conclusion of the witness on a question of law, which he is not competent to decide, and it is necessarily based on hearsay as to services performed by various people in connection with the Pabst goods, and in connection with other goods, and as being an attempt to put into the record evidence which should be obtained from the men who made the expenses, and thus know why the services were performed and what the expense was. For instance, there was a Christmas present included amongst these. There are stenographer's salaries included amongst them. There is a trip to Chicago.

Witness. The items of expenditures with reference to the business of this corporation so transacted in New York or in any other place in the east are sent on here and entered in our books here in San Francisco in the regular and orderly course of business. The reports come daily and weekly. A slip is made out by each salesman every day, but they do not always send them then.

The Court. Under those circumstances I think it is perfectly competent. The nature of the business transactions of this corporation

involve certain overhead charges as they are called (p. 159). There is a charge for regular salaries and for the expenses of transacting the business. Now, that business was, and the witness is competent to testify, of a certain volume, and making up of that volume was the disposition of this 1346 bales of hops which it is claimed here was disposed of on behalf of a broken contract with the Pabst Company. Now, they propose, and I think they are correct, to ask for, if they are entitled to damages, if the jury finds they are entitled to damages, the proportionate amount of the overhead charge which would apply to transactions involved in disposing of the 1346 bales of hops being returned to them. I think they are entitled to it, if the jury finds that they are entitled to recover at all. I will overrule the objection.

Mr. Powers. Exception (p. 159).

The sales book is in daily use. It took me five or six days to make this examination.

Q. Have you made correct estimates on the basis that you have given to the Court for your calculations?

Mr. Powers. I object to that on the ground that it calls for the conclusions of the witness on a question of law. There were sales of certain portions of these 2000 bales during the months of November, December, January and February, and the amount of goods left was, of course, diminishing. Now, the witness is asked whether or not he made a correct statement of it.

Q. Did you figure out mathematically correctly the amounts upon the basis you have given in your testimony? (p. 160).

Mr. Powers. I object to that on the ground already stated, and on the further ground that it is necessarily based on hearsay evidence.

The COURT. Objection overruled.
Mr. POWERS. Exception.
Exception No. 45."

And at page 161:

"Q. Please state what your examination discloses to have been the price obtained from the resale of the 2,000 bales of hops that it is claimed was sold to Pabst Company and refused to buy it?

Mr. POWERS. We object on the ground that it is irrelevant, based on hearsay evidence, based on a conclusion of law as to what is a proper method of apportioning; based upon an improper theory that the 2000 bales shall pay a proportion of the entire overhead expenses from November 4th, 1912, until the last bale was sold.

Mr. DEVLIN. I will change that question.

Q. Have you made an examination of the books of plaintiff for the purpose of ascertaining what the books show was the loss that had been sustained by the plaintiff measured on the assumption that the hops were sold to Pabst & Company at 20¢ per pound, and what plaintiff actually received for the hops, together with the cost of reselling them? Have you made such an examination?

A. Yes. And I have made the calculation just described for the purpose of ascertaining that fact.

Q. Will you please state the result.

Mr. POWERS. I repeat the objection, that it is based on hearsay evidence as to what was the cause, and the reason for the several expenditures reported from the Eastern states.

The COURT. Objection overruled.

Mr POWERS. Exception.

A. The 2000 bales were resold at an average price of .1366c.

The COURT. We do not want the average rate at all. We want the actual amount you received on the sale of these hops. Based on the figures that you have heretofore given.

A. $23,584.80. $32,651.73 plus several items that I have tabulated in accordance with my previous testimony. I figured the overhead to be $4459.30."

And thereupon the witness produced a tabulated list of office expenses shown at pages 163 to 179 of the transcript, which includes expenses in November, 1912, such as taxi, tips, bag boy, porters, car fare, phone calls, telegrams, $7.40. In February, 1913, when Mr. Horst testified that practically all the Pabst hops had been sold, stamps $10.00. In May, 1903, when there were only 34 bales of Pabst hops unsold, expense account $209.50, and included Fidelity Whs. Co., $22.64; N. Y. Tel. Co., $33.50; rent $100.00; Foster Scott Ice Co., $3.25;

During the same month in Chicago, stenographer's salary $12.50. During the same month Irving G. Markwart's expenses including expense of cigars $.25. Merchants' credits as a salesman from November, 1912, to July 1, 1913, amounted to $975,-00, $125.00 a month.

He also testified (p. 182):

"When you made up the price for which certain goods sold, how did you determine what portion of the 2000 bales should be used to fill that order?

A. Well, these are all the sales of Cosumnes hops since November 4th, 1912, that are included in this list. There were 1346 bales by

the eastern offices, and 494 bales by *filling contracts already in existence.* The remaining 1062 bales were also delivered on previous sales."

Again the question was asked Mr. Lange, by Mr. Powers (p. 186):

"Q. On January 1st, 1913, how many Pabst goods were on hand unsold?"

And the Court ruled of its own motion:

"I regard this as very immaterial, unless you show me that it is material.

Mr. POWERS. They raised the salary of the New York man when the amount of goods was less to be sold, and it shows that there was no connection whatsoever between the amount of Pabst goods to be sold and the expenses.

The COURT. That does not make any difference. A man transacts his business in a certain way. There comes a time when he feels that an employee's services are worth an increase in salary. Now the particular condition of the business with reference to any one transaction is wholly immaterial. It is immaterial as relating to a particular transaction except in so far as it may properly be charged to the proportional amount of the entire expenses of that transaction. I cannot permit you to go into this in such minute detail.

Mr. POWERS. Exception."

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THE ENTIRE CASE OF HORST COMPANY AS TO DAMAGES WAS BASED ON HEARSAY EVIDENCE.

Thus it will be seen that Horst Company's entire case as to amount of damages rested on hearsay testimony of Mr. Lange, who was not its book-

keeper but an assistant of Mr. Horst in San Francisco and who was in no way connected with the sales department in Chicago, and New York.

He, alone testified as to the costs of maintaining the Chicago and New York offices and expenses incurred in selling this uncertain unidentified 2000 bales of hops by him called Pabst hops and he and Horst alone testified to prices obtained therefor from November 5, 1912, the date defendant rejected Horst Company's samples unto July 1, 1913, the day when the very last bale of "air dried" hops manufactured by Horst Company were sold.

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NOBODY CONNECTED WITH THE TRANSACTIONS OR ORIGINAL ENTRY OF THE TRANSACTIONS TESTIFIED.

Using these figures received by unverified written reports from Chicago and New York as a basis, Lange sometime in 1914, while preparing testimony for use in the trial of this case empirically pro rated the cost between a portion of two thousand bales which were assumed to have become the property of Pabst Company on November 5, 1912, and certain other bales which were in Horst Company's hands for sale at the same time on the basis of number of bales on hand on November 5, 1912. No witness party to the transactions was introduced to prove a single expenditure nor the connection of any expenditure with sale of goods on hand at the time the transactions referred to were made

nor the connection of the hops on hand with the respective transactions.

Lange specifically stated that he did not know whether the transactions occurred as reported or not.

Mr. Horst testified likewise as follows:

> "The New York office took care of rejections of other goods than Cosumnes hops and of all other business. Everything that was pertaining to our business they took care of there. *I did not know personally what was done by each man when he went out on a trip other than by the knowledge I gained from what he told me*" (pp. 120, 121).

Mr. Horst was the only witness who testified to the sale prices of the so-called Pabst hops besides Mr. Lange. They both testified from the contents of written reports made by employees in Chicago and New York who were not sworn and whose names were not given but neither the facts nor the reports were introduced in evidence.

**Pabst Company was thereby refused the right to cross-examine any witness as to the actual sale price and expenditures connected with the so-called 2000 bales of Pabst hops.**

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AS TO BAD ACCOUNTS INCLUDED IN OVERHEAD.

The so-called overhead charges included a selection of the bad accounts and low price sales of the Horst Company during the years 1912-3 and charging them partly to Pabst Company over the objections and exceptions of the Horst Company.

For instance Lange testified (p. 148):

> "The miscellaneous charges consisted of storage charges, local freight, cartage and weighing, sampling, repairing and any other charges like that that we could have the vouchers to cover.
>
> Q. Have you stricken out of that list all expenses in connection with trips to Canada and things of that kind?"

And the witness replied:

> "Mr. Devlin, that would not go under these miscellaneous charges. That would go in under overhead. There are discounts to brewers for cash payments."

It must be remembered that Mr. Horst testified that goods like the Pabst Company's could not be sold in Canada at a fair rate because of the tariff in Canada (p. 118).

The most flagrant of these abuses was that of the bad accounts.

The witness testified (p. 151):

> "There is a list of bad accounts, uncollectible accounts * * * These items were collected. We invoiced them at a certain price and got a less price. We had to collect them through collection agencies and we got a less price. We have not been able to collect at all for them. We lost the money.
>
> The COURT. Were those sales made in the usual and ordinary course of business transactions of that kind?
>
> A. They were beyond our control.
>
> Q. Bad accounts you call them?
>
> A. Yes. At the time we sold them, the breweries were considered all right, and there

was nothing to show that we could not get our money from them. They were sold in the regular course of business, the same as any other.

Mr. Powers. I object to any testimony as to bad accounts on the ground, first, that there is no particular 2,000 bales set aside to the Pabst people, and when there were 3,000 bales on hand there was nothing to show, at the time the original sale was made, that these were sales made for the Pabst Company account, or the goods of Pabst & Company. Second, when the Horst people sold those goods they then took those accounts in place of the claimed account against the Pabst people, and it is immaterial and irrelevant, and based upon hearsay testimony, as to whether these people are able to pay or not."

It will thus be observed that this witness was permitted to testify from written reports made by the Chicago and New York managers, that certain sales made by them to brewers of goods which at the time of the sales were in no way connected with Pabst Company were sold in the usual and ordinary course of business and that the brewers subsequently became unable to pay their bills and that the losses thus accrued under circumstances that they were not able to avoid.

In other words, the theory of Horst Company was that they were bailees of 2000 bales of Pabst hops. They intermingled these hops with their own hops. They sold the hops thus intermingled and such of the customers as subsequently proved to be incapable of paying, were charged to the Pabst account as if sold to Pabst at the prices incurred

thereby making the Pabst Company the insurer of their sales. And the testimony of the parties connected with the dealings was denied Pabst Company because the Court refused to follow the rules of evidence requiring that some person connected with the original transaction testify so that the other party to the transaction would have an opportunity to cross examine. At the time of the sales no attempt was made to charge them to Pabst.

It will be observed that never at any time has any respresentative of the Pabst Company had an opportunity to investigate any of these transactions.

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AS TO ERROR IN ACCEPTING SALE PRICE IN THE EAST AS MARKET PRICE.

Horst admitted that Sacramento was the natural market for Cosumnes goods but testified that his hops could not be sold there. He did not claim that hops equal to 25 to 38 could not be sold there.

The other experts testified that choice Cosumnes hops could have been sold, and others were sold, to the amount of 2000 bales for from 17 to 21 cents in November 1912, in Sacramento.

Mr. Horst testified at page 72:

> "Sacramento would be the nearest Market. The most of the business would be done in Sacramento hops in Sacramento. It would not be possible to market that quantity of hops in Sacramento at that time, at a profit. There is

really no such thing as a market price for hops because hops are sold on private contract and are sold in advance.

Mr. Otto J. Koch testified (p. 297):

"I am a buyer in the Sacramento market. I was familiar with the hop market in 1912. The market for Cosumnes hops at that time was 17 to 17½ cents for choice hops. I attempted to buy them at that time. *I wanted to buy 1000 bales if I could get them, choice air dried Cosumnes hops of the* character cured by Mr. Horst. At that time I would have bought them at that figure. This price 17 to 17½ cents was the price to the grower. I turn them over to George Proctor, who is a dealer. The commission for a broker in this market is one-half a cent. I do not know what the commission is for a broker selling from a dealer to a brewer. The market for choice Cosumnes hops in 1912, was strong."

Mr. Mahan testified (p. 292):

"I put all my hops in together in the season of 1912. I sold my hops to Nebius & Drescher, who were also dealers in the Sacramento market."

Irving S. Marks was a hop buyer throughout the Sacramento Valley for sixteen years near Sacramento (p. 246).

He testified (p. 250):

"In November 1912, the value of the choice air dried Cosumnes hops was 17½ to 18 cents.

The Court. Could you have disposed on the market at that time of 2000 bales of Cosumnes hops at 17 to 18 cents?

A. Within a time I could. It might have taken six weeks. The reasonable value of the service of a broker in selling hops from grower to dealer was half a cent a pound.

Mr. Sweeney testified:

"He was a hop merchant for thirty years, was familiar with the value of air dried Cosumnes hops in November 1912. There was a sufficient market for air dried Cosumnes hops in 1912 to take 2000 bales. The price was 18¾ cents from grower to dealer (p. 257). and 20¼ to 22½ cents from dealer to brewer (p. 258). If we had cut the price one cent on 2000 bales of Cosumnes hops it would have taken two or three weeks to have sold them (p. 271). I, myself, would have bought choice air dried Cosumnes hops in Milwaukee in 1912, as cheap as I could. I pay in November 18¾ cents and 18 cents out here on the coast for choice Cosumnes hops. They were absolutely the same commercial value as air-dried Cosumnes hops."

Also (p. 271):

"In November 1912, I, myself, sold 1500 bales. With reference to sale of choice hops to brewers the market at that time was 22 to 24¢ and there was a demand."

Mr. Drescher testified (pp. 88-90-93-95-96):

"He was a hop merchant for forty years in Sacramento County. Bought and sold for many years (p. 88). With reference to price of choice Cosumnes hops during the month of November 1912, the market price obtained at that time was 17½ from dealer to dealer. Also (p. 90). He also testified (p. 95). I imagine I sold a thousand bales between November, 1912, and

March, 1913. On November 14th, we sold to Faulk-Wanzer 210 bales at 19¢ delivered in California, f. o. b. Sacramento; December 23, 1912 to Geo. A. Proctor 200 bales, at 17¢. January 4, 1913, to A. Magnus & Sons, 110 bales at 17½¢. January 4th, 78 bales at 17½. Feb. 7, 1913, 300 bales at 17½¢, and 321 bales at 18¢. Some of them were Cosumnes hops and some coast hops. 621 bales were Cosumnes hops. Between November, 1912, and March, 1913, I sold two orders to two different people. I think 2,000 bales of choice Cosumnes hops in November, 1912, from the inquiries made at that time would have been sold in a reasonable time, I would say twenty or thirty days, depending on the efforts made to reach the market,—not for 20¢, but for 17½¢. The market value of choice air-dried Cosumnes hops from November, 1912 to March 1913, was between 17½¢ to 19 cents, and the market would take as high as 2000 bales. If they were offered at ten cents a pound in November, 1912, they would be taken up at once. If they were offered at 16¢ a pound I believe it would not have taken to exceed ten days. If offered at 16½¢ it may have taken a few days longer. It would depend on how actively anyone had offered them. There was a good demand for that class of hops. The proportion of choice hops in the season of 1912, was smaller than usual, owing to the fact of the crop having been damaged by rain towards the latter end of the picking season. * * * The choice hops other than air-dried Cosumnes hops, were fairly well sold out during November 1912. There was a good fair demand for choice air-dried, Cosumnes hops during the season from November, 1912, to March, 1913. The demand was stronger for choice hops at that time than for the lower grades."

There was no effort whatsoever on the part of the Horst people to prove what was the market price of Cosumnes hops in the East at the places where the goods were sold and the Court accepted the sale price given by Horst and Lange as the market price where sold. These sales were made by third parties and neither Horst nor Lange claimed to know what the market was at the places sold.

The only expert that they produced who ever sold hops testified (p. 210):

> "Q. In November, 1912, were choice hops in demand.
>
> A. No, not in demand. Occasionally, yes, you would get an order, you know, I do not sell much to brewers. * * *
>
> Q. Medium Cosumnes at times were a drug on the market, but choice Cosumnes were in demand?
>
> A. Choice hops are always in demand. They always want choice hops."

All the witnesses testified that Horst "air dried" hops were commercially the same as other Cosumnes hops.

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MANNER OF RAISING POINTS AS TO IMPROPER ENTRIES IN BOOKS.

This point was raised as follows:

(a) Exceptions were reserved to the question asked the bookkeeping assistant as to whether or not he had made examination of the books to as-

certain the prices at which the hops had been sold, and the persons to whom they were sold and what books he examined.

(b) Also what was the aggregate of the charges.

(c) Also as to what the interest on losses was.

(d) Also as to what the books showed were the expenses incurred in Chicago and New York.

(e) Also as to the manner of application of storage charges, local freight, discount and the like.

(f) Also as to the several items of overhead expense.

(g) Also as to bad accounts.

(h) Also as to calculations as to what his opinion was as to the proportion of the expenses that the 1300 bales sold on Pabst account, bore to the total expense.

(i) Also as to what his examination disclosed to have been the price obtained from the resale of the 2000 bales of hops that was claimed to be sold to Pabst Company from examination of the books themselves.

(j) This also comes up by way of motion to strike out answer of the defendant Lange as to the sales having been made of 1920 bales on coast delivery prices.

(k) Also by the refusal of the Court to strike out the testimony of the witness Lange concerning the losses because of bad accounts.

(l) Also refusal to strike out the testimony of the witness Horst with reference to the prices for which Pabst 2000 bales of goods were sold.

(m) Also by overruling objections to questions asked witnesses Horst and Lange concerning the expenses of the 1300 bales which were claimed to have been sold on Pabst account, because said witnesses were not shown to have had any information as to the connection of the several items with the goods sold on which to base a proper pro rating of the expenses for the sale of these particular goods which were sold contemporaneously with other goods then in stock, some of which were of similar character, and some of which were of dissimilar character and because the pro rating necessarily carried with it conclusions of law as to the manner of application of expenses under circumstances which existed at various times from November, 1912, to July, 1913.

(n) Exception to the ruling of the Court refusing to strike out all of the testimony of witness Lange concerning transactions occurring in Chicago and New York and reported to the San Francisco office and by Lange tabulated and testimony as to storage, insurance, bad debts, bookkeeping, travelling expenses, stenographer, Christmas presents and other charges of that character.

**AS TO ERRORS IN ALLOWING EVIDENCE OF THE SALE PRICE OF UNIDENTIFIED SO-CALLED 2000 BALES PABST HOPS WHILE THE SAME WERE NEVER EAR-MARKED AS BELONGING TO PABST COMPANY.**

4. The Horst Company conducted its business and handled its stock of hops after November 4, 1912 (the date of the rejection by Pabst Company of its offer of delivery) in the same manner that it had prior to that time.

No instructions were given to the Chicago and New York offices nor any of the employees to treat any particular lot of hops as being held by Horst Company as bailees for Pabst Company.

They claim they sold 1346 bales of goods in the market with all other of their goods as their own and filled existing contracts from other bales of the same class on sales already made and then when it came to prepare for the trial of this suit they selected such of the sales as were lower than twenty cents and considered them Pabst goods, and the Court refused to allow the jury to know the price obtained for the goods on hand which were sold at a price in excess of twenty cents.

We have already quoted the testimony of witness Lange on cross-examination (p. 182).

When referring to lots 523 and 524, Mr. Lange testified (p. 196) to question:

> "Q. When were they made the basis of any charge against the Pabst Company?" as follows:

"A. When we made up our list of 2000 bales —*just since we have been getting up statements of the account you have asked for.*"

In other words while preparing for the trial of the case in April, 1914, this bookkeeping assistant made a selection of such sales as had been carried on by Horst in 1912 and 1913 by selecting sales of 1346 bales instead of 1506 bales as for the Pabst account and selected 494 out of the 1556 bales used to fill contracts in existence by taking such as had prices less than 20 cents and this lot of 2000 bales thus selected over a year after the transactions occurred were called sales on account of the Pabst 2000 bale contract for Pabst Company.

Horst Company over Pabst Company's objections introduced testimony as to an undefined non-existing as an entity two thousand bales of hops called by the witnesses "the Pabst two thousand bales". At no time did any one, even Horst Company's employees physically see or know these two thousand bales or any of them while they were known as Pabst hops. At no time did any one make an entry in any book designating any particular bales as belonging to Pabst Company until long after the sale of all 1912 hops.

The total number of bales of hops produced by Horst Company on its Cosumnes ranch in 1912 was 4300 bales (p. 136). Of these 200 bales were what Horst called "clean ups" (p. 136). "Clean ups" is a term given by Horst Company to hops that were not of a choice character. Giving Horst the benefit of the doubt there were 4100 bales left

which were claimed by Horst to be choice hops of a uniform character. According to Mr. Horst's testimony one bale was not different in quality from any other. Mr. Lange testified that 494 bales of these hops were used to fill contracts in existence before November 4, 1912.

The uncontradicted evidence is that the sale books show that up to November 4, 1912, the date of the breach of the contract 2764 bales of these Cosumnes hops had been sold to persons other than Horst (p. 365) and on that date therefore Horst Company had 4000 bales less 2764 bales or 1336 bales and no more available for delivery. Hence the Horst Company lacked the difference between 2000 bales and 1336 bales—664 bales to fill its contract with Pabst.

Horst Company's testimony is that the bales that they had available for delivery to Pabst Company were of the Horst production of his Cosumnes ranch to wit, these 3062 bales (p. 366).

It is evident that in order to use as a basis for damage the actual sale price of any definite number of bales of hops, that there must have been sometime in which those bales were definitely established as being set aside for Pabst.

In this brief we will refer to it as we did in the trial of the case, by saying that they should have been "earmarked".

It is not our contention that Pabst would have been relieved from damages, were they held otherwise liable, because of the absence of the earmarks, if as a matter of fact Horst Company had on hand

hops with which they could have filled its contract with Pabst Company, but it is our contention that it is error to establish damages by means of proof of what an undefined two thousand bales of hops which did not exist as an entity were sold for by testimony as to sale price of hops used in filling contracts in existence on November 4, 1912, where from a large number of contracts filled by plaintiff, some carrying price as high as 26 cents, the Horst Company selected such contracts as were for prices less than twenty cents a pound for hops sold prior to November 4, 1912, and treated them as Pabst Company's sales and refusing to allow testimony as to the remaining contracts where the price was over 26 cents and in order to account for the remainder of 2000 bales to offer evidence as to results of sales of the other bales of hops while Horst Company was conducting its business, partly with the idea of developing new trade and partly with the intent to retain its old customers and for other general purposes not connected with Pabst Company or its so-called hops including co-operation with the San Francisco office in the sale of the remaining bales of 10,500 bales in said office on November 4, 1912.

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MANNER OF RAISING QUESTION AS TO PROPER EARMARKS.

The question was raised as follows:

(a) By exception to the question asked witness Horst, "What did you do with these 2000 bales of hops that you sold for Pabst Brewing Company and they refused to accept?"

(b) And by sustaining Pabst Company's objections to the question asked witness Horst, "What steps, if any, did you take to set aside that 2000 bales for the Pabst people on November 4, 1912, when the defendant notified the plaintiff that they would not take the hops offered", and other similar questions directed to the question as to whether or not any steps were taken to set aside or use any marks to indicate any portion of the bales which were then on hand for the Pabst people.

(c) Also exception saved to question asked witness Horst, as to how he arrived at the selling price of the 2000 bales of Pabst goods.

(d) Also as to whether or not certain expenses were incurred in New York and Chicago and Eastern states in selling a portion of the 2000 bales of Pabst goods.

(e) Also the question as to whether or not items of overhead expense, such as bad accounts relating to the 2000 bales of hops belonging to Pabst.

(f) Also as to his calculations as to the portion of the expenses that the 1300 bales bore to the total expense which had been described.

(g) Also to the question asked, "Please state what your examination discloses to have been the price obtained from the resale of the 2000 bales of hops that it was claimed were sold to Pabst Company, who refused to buy them".

(h) Also with the exception to the Court denying Pabst Company's motion to strike out the testimony of witness Lange, that most of the sales

made of the 1920 bales of the 2000 bales sold other parties after November 4, 1912, were sold on delivery prices, on the ground that it takes for granted the fact to be in evidence that there were 2000 bales sold on account of Pabst Company.

(i) Also the exception to the refusal to allow testimony as to where all of the 4500 bales which included the 2000 bales of Pabst Company, were stored.

(j) Also the refusal to allow the question as to delivery and dates of delivery of Cosumnes goods made on contracts which were in existence at the time of the commencement of the season in 1912.

(k) Also refusal to allow the testimony as to what allotment of Cosumnes goods held by Horst when the Pabst Company's breach was made to the various contracts then existing.

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AS TO ERROR IN ALLOWING PROOF OF PRICES IN FEBRUARY BASED ON ALLEGED CUSTOM AS TO DELIVERY.

5th. The correspondence on which the contract is based was silent as to the dates of delivery of hops covered by the contract, although a draft of contract submitted by Pabst Company called for shipment before December and another draft of contract submitted by Pabst Company called for shipments, October to March. Neither draft was executed by both parties, and Horst Company attempted to prove a custom, to wit: that the time of delivery was any time up to March of the year

following the harvesting of the hops and this custom was attempted to be proven by what Horst Company itself *alone* did on one or two occasions and not what was the universal custom by people buying and selling hops.

Am. & Eng. Enc., Vol. 29, p. 367.

Mr. Horst admitted, however, that when he sent a contract to Pabst, referring to this 2000 bales sale, that he arranged for delivery September and December (p. 111).

Mr. Drescher who had been in business for forty years in Sacramento testified (p. 94), that there was no such custom.

No person other than Horst testified to this custom. Horst then attempted to establish the price of hops in the month of February, 1913, at the nearest market, to wit, Sacramento, as 11 and 12 cents a pound, concentrating his testimony in February, 1913. Several other dealers showed the actual purchase and sale of Cosumnes hops up from 500 to 2000 bales at 17½ to 18¾ cents in November, December on.

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THE MANNER IN WHICH THE QUESTION WAS RAISED.

During Horst's examination, the following proceedings took place (p. 80):

> "Q. State what, in your opinion, was the reasonable price that you could have realized for the sale of 2000 bales of air-dried, choice Cosumnes hops, if sold in that quantity, in the month of February, 1913, at the nearest market.
>
> Mr. POWERS. I object to that as irrelevent,

incompetent and immaterial, and being an improper question. The contract, if breached at all, was breached in November, and the sale should have taken place then. The question should be directed to a reasonable time after the alleged breach. Also that it does not detail the proper time for the estimate for damages.

Mr. DEVLIN. Please state what was the market price that could be obtained in the month of February, at the nearest market for that class of hops in February, 1913?

Mr. POWERS. I object on the same ground.

The COURT. Objection overruled.

Mr. POWERS. Exception.

Exception No. 11."

AS TO ERROR BECAUSE OF REJECTION OF TESTIMONY OF WITNESSES WHO TESTIFIED TO THE IMPROPER MANNER OF PICKING HOPS BY HORST COMPANY.

6. Mr. Horst testified that all hops produced by him were universally the same character in all the bales, save and except one small lot of 145 bales which he called "pick ups". The cleanness of the hops was a vital disputed point.

Pabst Company produced two witnesses who testified that they were present at the time these hops of Horst Company afterwards claimed by Horst Company to be of grade equivalent to samples 21 to 24, were being picked and dried and for over two hours they actually saw that the hop picking machine used by Horst Company was not in efficient running order but was so arranged that the stems and twigs and leaves were carried into the hops while the same were being

dried and baled and that the man in charge of the work told them he had instructions to let everything go into the hops because they had a large eastern order to fill.

Witness G. S. Chalmers testified (p. 302) as follows:

"The Court. Tell us what you saw.

A. I went there to see the picking machine run and it was running. The man who had charge of the picking machine was at the picking end of it and I asked him if I could look through it, and he said 'I will show you'. We went to the back end where the elevator was taking the leaves into the kiln. They had canvas along there to keep the leaves from going out. The stems and leaves were going into this elevator, and I said to the man, 'Don't you pick out none of the leaves'.

Mr. Powers. Q. What did you do about an examination of the kiln?

A. I went up to the kiln, and the hops were powdered up in the kiln where they were drying. They went into the cooler room and there was a man there bailing them. They were going into a bale, then they were putting them out in the plains in the boiling hot sun with no cover over them whatever.

There must have been fifty men working there, and the particular person we had the conversation with was in charge of the picking machine. I asked for Mr. Conrad and he said he was on another ranch and that he had charge of the picking machine at the time. He also said he would show me around. We walked along looking at the machine and to where the hops were going out of the elevator into the kiln. I do not think I could identify the man at the present time if I saw him. He was a large man. It was my first time on

the ranch. He was working actively. At the time he was. He had a long stick there and at times he would hit on the machine, and he gave orders to some Hindoos around there.

The COURT. The witness will not be permitted to testify further unless you can show the man in authority.

I went through the picking machine where they were picking; I went along to where the picking machine was and I asked him why they were lettng the leaves and stems go in there, and he said, we have got a cheap contract and we have orders to let everything go in.

Q. What was the condition that you observed concerning the leaves and stems going in, that lead up to this conversation?

A. Well, the thing that throws the hops out was not working at all. It was standing still, and that is how we came to talk about it. Then we went along the elevator that takes the hops up into the kiln.

The COURT. The leaves and stems were ground up and sent to the kiln.

A. The picking machine strips them right off, and the leaves and stems were going up into the kiln. You could not see many hops. There were no leaves or stems being thrown out by the machine at all, that I saw. What we call the drum was standing still. It was not running. The vines are pulled right through lengthwise and no leaves and stems are stripped off the best they can. What did not pull off they had a man outside picking them off, and they left the rest on, and a little stems, leaves and so forth went in with the hops. The biggest stems were not sent up with the hops. They did not grind the vines up. The man said that they had orders to let everything go up in the kiln. That they had a cheap contract and the blower was stopped.

The Court. All of this will have to go out. The witness has shown that he does not know anything about it.

All this evidence was stricken out by the Court over exception after it was introduced and much similar testimony was offered and refused by the Court over exception.

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AS TO ERROR IN REFUSING EVIDENCE THAT HOPS WERE TOO GREEN WHEN PICKED BY HORST.

7. The experts of Horst Company and Pabst Company differed as to whether the samples furnished by Horst Company to Pabst Company were properly rejected because the hops were immature when picked, that is to say, whether they were picked while too green to prevent them to have reached full maturity.

Experts in curing hops who were familiar with the hops grown by Horst Company and those raised in the vicinity of Horst Company's Cosumnes Ranch were offered to prove that at the time Horst Company's hops were being picked from vines of Horst Company that they were too green to be cured into a "choice hop".

Nevertheless the Court refused to allow the testimony as to the physical condition of Horst Company's hops addressed to its comparative immaturity or greenness when picked and when the Court discovered that the testimony of the witness Chalmers as to the greenness or immaturity of

Horst's hops at picking was not stricken out—the Court interrupted the argument of Pabst's attorneys and ordered it stricken out under the following circumstances, viz.:

Mr. Chalmers testified that he had been in the hop business in the Cosumnes district for over thirty years. Without any objection being interposed he testified that the hops were picked too green; he also testified as to the manner of the Horst Company working the hop picking machine. He testified with reference to the hop picking, which testimony was stricken out and then the witness was recalled at the request of the attorney for the Horst Company and thereupon the witness was again interrogated concerning what happened at the hop picking house with reference to the picking of the hops and absolutely nothing was said upon his second appearance as a witness about the greenness of the hops.

At the conclusion of the witness' testimony when recalled the Court, of his own motion, said (pp. 364-5):

> "The Court. This evidence should not be permitted to stand. It is absolutely indefinite.
> Mr. Devlin. It is stricken out your Honor.
> The Court. Yes.
> Mr. Butler. Exception.
> Mr. Powers. Your Honor has stricken out the conversation. How about the witness seeing the physical fact of the leaves going in?
> The Court. I am striking out the whole of it. There is nothing to connect it with the plaintiff.
> Mr. Powers. Exception."

Subsequently while the attorney for Pabst Company was arguing the case and referring to Mr. Chalmers' testimony in reference to the green condition of the hops the record shows that the Court permitted Mr. Devlin to interrupt argument and then for the first time the Court struck out the testimony as to the greenness of the hops.

The record shows (pp. 366-7):

> "Thereupon Mr. Devlin interrupted as follows:
>
> That testimony was stricken out. Counsel is now referring to testimony that your Honor has stricken out.
>
> Mr. Powers. Mr. Chalmers testified yesterday with reference to the fact that the hops were picked twenty days earlier. That has not been stricken out.
>
> The Court. All of his testimony went out.
>
> Mr. Powers. Including that about the picking?
>
> The Court. Yes, it was wholly irrelevant, The question is What was the quality of these hops when were they tendered to the defendant?
>
> Mr. Powers. Exception."

The record also shows that Mr. Devlin and the Court were wrong with reference to the testimony as to the greenness of the hops being stricken out.

The record shows (pp. 303-4):

> "Q. What was said to you by the man in charge with reference to the manner of bailing the hops, so far as the leaves and twigs were concerned?
>
> Mr. Devlin. I object to that as irrelevant, immaterial and incompetent and hearsay.

The COURT. The objection is sustained.

Mr. POWERS. Exception.

Q. What was the condition of the hops in the Cosumnes district with reference to ripeness on or about August 12th, 1912?

A. They were green. Too green to pick. They ripened from about the 20th to the 25th of August. There were no hops ready to pick before that.

Q. While you were at the Horst hop house, and seeing the picker at work in the manner in which you state, did the man in charge say anything to you about the manner in which he was picking hops so far as leaves and stems were concerned? (252)

Mr. DEVLIN. I object to it as irrelevant, incompetent and immaterial.

The COURT. Objection sustained.

(Testimony of C. S. Chalmers.)

Mr. POWERS. Exception.

We respectfully submit that not only was the Court wrong in making the order striking out the testimony *de novo* during argument of the case, but also that if he had made the order after a proper objection while witness was on stand, it would also have been error.

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AS TO ERROR IN INSTRUCTING JURY NOT TO CONSIDER COUNTERCLAIM.

8. The contract itself as finally made was one whereby Pabst Company agreed to accept hops of a character equal to four samples (samples 21 to 24) which we have called type samples which Pabst Company forwarded to Horst Company. These samples were not "air-dried" hops. Pabst

Company forwarded samples 25 to 38 which they claim to be equal to the four type samples sent, and these fourteen samples (25 to 38) thus sent by Horst Company to Pabst Company were not all "air-dried" hops. Consequently the parties themselves contemporaneously with the execution of the contract did not consider the so-called "air-dried" qualifications as a part of the transactions.

Defendant relied upon plaintiff's representations that they could furnish goods like samples and did not buy its requirement in hops in the market until after November 4th, when the prices were in excess of what the contract price was and the Court refused to allow the jury to consider the testimony on this basis in order to establish Pabst Company's counterclaim and refused to allow a witness to testify as to sales made to Pabst Company in November, 1912, and instructed the jury to disallow the counterclaim.

Gustav Pabst testified as to the necessary purchase by Pabst Company after November 4, 1912, of certain hops at a price in excess of twenty cents, testifying (p. 344):

> "Because we had to have them in our business and to replace the hops which under the contract with E. Clemens Horst Company failed to deliver to us."

He then testified to the following purchases (pp. 344-5) viz.:

> "On November 25th, 1912, 19,332 lbs. at 21¢; 3108 lbs. at 23¢; 19,441 at 22¢; on November 14th, 1912, 16,837 lbs. at 22¢; on November 13th, 1912, 16,988 lbs. 22¢; on November 21st,

> 1912, 47,385 lbs. at 22¢; December 24th, 1914, 16,496 at 23¢. At net prices which showed the purchase of 868 bales of 167,562 lbs. for the net at Milwaukee less freight of $34763.57."

If Horst Company had fulfilled their contract these would have cost $33,512.40. In other words Pabst Company was damaged $1251.13 by the non-delivery of these 868 bales or 1.44 cents per bale and the jury had evidence before it to authorize the allowance of the $2000 damages asked for by Pabst Company—certainly up to $1251.13.

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**AS TO ERROR IN ALLOWING GROWER TO TESTIFY AS EXPERTS WHEN THEY KNOW NOTHING OF THE MARKET.**

9. A large number of hop growers who never had been party to the sale of any hops except those produced by themselves nor had any connection with sales to brewers and who knew nothing about the sale price of hops other than their own and who specifically disclaimed being hop experts, were permitted to testify as to the choice quality of samples of hops in question for sale purposes between the merchant and this brewer.

For instance, take witness Paul E. Peterson. He testified (p. 124):

> "Was a grower for 25 years. Am familiar with the supervision and caretaking of hops. First grew them in 1912. Did not see the 1911 crop. I have sold hops. Generally sell my hops as 'choice hops'."

He was asked (p. 126) to examine samples 1 to 20 and to state to the jury whether you consider them in your opinion as choice hops.

Mr. Powers' objection on the ground he was not an expert on the question was overruled and exception.

The answer was "I consider them prime to choice", and then he testified to the character, flavor and choiceness of various samples (p. 127).

On cross-examination he testified (p. 128):

> "I do not pretend to be a hop expert. My knowledge of hops has been gained by raising and selling them for about 25 years and about 3 years in the Cosumnes district. I have never bought hops for the market. * * * I sold my hops for 22 cents. There were some hops of that character sold that year in November but I don't remember. I am not a hop buyer so could not tell".

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AS TO ERROR IN ALLOWING HORST TO INTRODUCE EVIDENCE CONCERNING MAIN CASE IN REBUTTAL.

10th. On rebuttal Mr. Horst was asked by his counsel the question:

> "In your testimony I asked you certain questions as to your ability to deliver 2000 bales of hops equal in quality to samples 1 to 20. I now ask you if, on November 4th, 1912, you had 2000 bales of hops on hand equal in quality to samples 21 to 24? (p. 365), and also, on that date, if defendant was willing to accept, were you able, ready and willing to deliver the 2000 bales of hops equal in quality to samples 21, 22, 23 and 24"?

His answers to these questions were that he would have been able to deliver them out of the 3042 bales of air-dried Cosumnes hops manufactured on his ranch.

These questions were identical in purpose with that which the Court had refused to allow Pabst's attorneys to ask the same witness during his cross-examination (at p. 99, Except. No. 5).

The witness had already testified to the matter in chief and this testimony was permitted in rebuttal after the Court had refused to allow Pabst Company the benefit of the evidence during the trial of the main case.

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THE SPECIFICATIONS OF ERRORS RELIED UPON.

The Court erred in rejecting all testimony except that referring to the Horst process of "air dried hops" and in limiting all questions to experts as to the price and market for hops of that description.

Categorically this comes by virtue of exceptions 38, 39, 40, 43, 67, 68 and 71, with reference to the purchase by Horst of Cosumnes hops for seventeen cents a pound in November, 1912, at a time when he testified that he had sold hops which he had offered Pabst people as a compliance with their contract to others for fourteen and fifteen cents a pound.

The questions are as follows:

> "38. Q. Asked Witness Horst: Did you not in the latter part of November, 1912, buy some Cosumnes hops from Wolf Netter & Co.

39. Q. Did you buy Cosumnes hops of the same quality as air dried Cosumnes hops in the latter part of 1912?

40. Q. Did you buy hops in San Francisco of a character which was accepted by the trade as Cosumnes hops which could have been used as a delivery on the four samples numbered 21 to 24, submitted by the Pabst Brewing Company to you?

43. Q. Did you buy hops in San Francisco of a character that was accepted by the trade as Cosumnes hops which could have been used as delivery on the four samples 21 to 24 submitted by the Pabst Brewing Company to you?"

Witness Marks was an expert who had been handling hops in the Sacramento market for many years, in buying and selling. There was no question made as to his capacity as an expert but he testified that he did not know "air dried hops" of the Horst process as distinguished from any other hops and the Court refused to allow him to answer the following questions:

"67. Q. You have seen certain samples of the Horst hops. What would be the reasonable market value of a hop of the character of one to twenty (Horst hops) if it were choice, in the month of November, 1912?

68. Q. What was the reasonable value of choice air dried Cosumnes hops dried under a process whereby the hot air is put into the kiln from the outside?"

His testimony, if given, was that the value of such hops was 18 to 20 cents a pound in the Sacramento market in November, 1912.

The Court not only refused to allow witness Sweeney to testify to the value of hops other than the particular Horst process of "air dried hops" but announced that he would instruct the jury that only the Horst "air dried hops" were called for by the contract. Categorically the questions and instructions were as follows:

> "71. The Court erred in requiring witness Sweeney to confine his testimony to air dried hops under the following circumstances:"

The same type of error was committed in the matter of refusal to allow the defendant to prove by witness Horst that samples 25 to 38 forwarded by him were not air dried Cosumnes hops of the character manufactured by him.

> "55. Q. Were the samples 25 to 38 of Cosumnes hops, all air dried Cosumnes hops, or were they other kinds of hops?
>
> 56. Q. Is there any way you have of refreshing your memory so that you could tell us?
>
> 71. The Court erred in requiring witness Sweeney to confine his testimony to air-dried hops under the following circumstances:
>
> Q. Asked Mr. Powers: Were you familiar with the value of Cosumnes hops in the month of the year 1912?
>
> A. I was.
>
> Mr. Devlin. I shall object unless the inquiry be confined to air-dried hops.
>
> The Court then said: He does not think that has any significance. I am bound to instruct the jury that it has. It characterizes the class of hops that are called for by this. Confine yourself to air-dried hops."

The Court erred in instructing witness Sweeney to confine his testimony to air-dried Cosumnes hops.

This is also covered by generic specification as follows:

> "113. The Court erred in refusing to allow the testimony concerning the prices paid by plaintiff for Cosumnes hops which were not air-dried, but which were purchased by Horst in November, 1912, because Horst testified that some of the samples sent by him included in 25 to 38 were not air-dried, and all of the witnesses testified that the commercial value of air-dried Cosumnes and other Cosumnes were identical and Horst himself testified that he could not tell the difference between the air-dried and the kiln-dried Cosumnes hops when they were in the market (p. 431).
>
> 133. The Court erred in refusing to allow any testimony except as to air-dried Cosumnes hops because the contract as finally confirmed referred to hops equal to samples 21 to 24, and the contemporaneous interpretation of the contract by both parties was that any hops equal to those samples should be accepted, and witness Horst testified that the samples 25 to 38 were not air-dried, and witness Lange testified that he did not think they were all air-dried Cosumnes hops" (p. 439).

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CONCERNING BOOKKEEPING ENTRIES.

The Court erred in overruling defendant's objection to questions asked witness Horst as to amount of travelling expenses, insurance, and the like. This is covered by specification 7. And also in the following specific instances, viz:

> "15. Q. Asked witness Horst: How much do you estimate that the overhead expenses were

increased by the fact that you had to sell through agents in Chicago this 1500 bales of so-called Pabst hops?" (p. 394).

Also as to questions asked witness Lange:

"17. Q. Have you made an examination of the books for the purpose of ascertaining the price at which they (the hops of plaintiff) were sold and the persons to whom they were sold and what books did you examine to do that? (p. 395).

18. What is the aggregate of the miscellaneous charges for the sale of Pabst goods?

19. Q. Asked Mr. Lange: Did you figure any interest on losses? (p. 396).

20. Please state what you put into the selling cost and how you arrived at it to be distributed to these 2000 bales? (p. 397).

21. Beginning on November 4th, 1912, until you finished selling the remainder of the bales, about 1300 and some odd bales, were there certain expenses incurred in New York and Chicago and Eastern States in selling the remainder of the 2000 bales of what we call the Pabst hops and other hops?

22. And in lieu of a cent and a half a pound, you are simply giving here a proportion of the overhead charges in the New York office for selling these 1300 bales of hops. Is that correct? (p. 398).

23. Overruling objections to a series of questions asked witness Lange concerning his examination of the books and the vouchers and his application of storage charges, local freight, cost of calculation, discount and the like."

And also:

"Q. Explain the other items of overhead, such as bad accounts (Exception No. 35)."

And also the question referring to the salaries paid to the salesmen and the charges of the stock-room and the like, viz:

"And they related to the 2000 bales of hops and also to the other hops? (pp. 398-9).

24. Did you make any calculation as to the proportion of the expenses these 1300 bales bore to the total expense, that you have just described? (p. 330).

25. Have you made correct estimates on the basis that you have given to the Court for your circulation? (p. 400).

27. Please state what your examination discloses to have the price obtained from the resale of the 2000 bales of hops that it is claimed was sold to the Pabst Company and refused to buy it?

28. Will you state the result of the examination of the books of the plaintiff for the purpose of ascertaining what the books show was the loss that had been sustained by plaintiff measured on the assumption that the hops were sold to Pabst Company at 20 cents a pound and what plaintiff actually received for the hops. together with the cost of reselling them? (p. 401).

29. The Court erred in allowing all questions concerning the entries in the books to witness Lange with reference to the connection that the several expenses incurred during the months of November, December, January and February had to the 2000 bales of Pabst goods, or to the defendant (p. 402).

31. The Court erred in denying defendant's motion to strike out the answer of witness Lange that the most of the sales made of the 1920 bales of the 2000 bales sold other parties after November 4, 1912, were sold on delivery prices, on the ground that it takes for granted

the fact to be in evidence that there were 2000 bales sold on account of the Pabst Company (p. 402).

88. The Court erred in refusing to strike out the testimony of Lange concerning the overhead charges, insurance and the like because it was hearsay testimony. The substance being that certain entries made by other from transactions carried only employees in the east showed certain charges (p. 424).

89. The Court erred in refusing to strike out the testimony of witness Horst concerning the existence of the 2000 bales belonging to defendant at the time of the breach, on the ground that he referred to records to show their whereabouts and refused to produce the records and testified that none were 'earmaked' to identify them as defendant's property (Exception No. 61) (p. 424).

90. The Court erred in refusing to strike out the testimony of witness Horst, with reference to the portion of the 3062 bales of hops which were designated by him as Pabst goods, or being used by him for the purpose of completing the Pabst contract, because the substance of the testimony showed it was impossible to determine that there were 2000 bales on hand on November 4, 1912, or what was the price paid for any hops available to be used to fill the Pabst contract and because simultaneously there were other goods in the 3062 bales then on hand sold for higher prices which were not in any way earmarked as belonging to others but which were not included in the Pabst sale (p. 424).

92. The Court erred in overruling plaintiff's objections to the testimony as to losses incurred for bad debts and uncollectible accounts, for goods claimed to have been sold on account of the Pabst Brewing Company at the time the

sales were made they were not made for the Pabst account but subsequently when the losses occurred, and plaintiff then claimed that they were Pabst's sale (p. 425).

93. The Court erred in refusing to strike out the testimony as to loss by bad debts (Exception No. 36).

95. Also the Court erred in denying the motion to strike out all of the evidence of overhead charges depending upon items that were not shown to be directly connected with the 2000 bales of Pabst Brewing Company goods, or the goods that Horst set aside for Pabst Brewing Company, which had been designated to fill the order of Pabst Brewing Company, because it was based on hearsay evidence of the manner in which the expenses were incurred, irrelevant, and immaterial and conclusion of the witness as to how much of each particular account should be charged and was based on matters that lay partly in law and partly in fact and calling for the conclusions of the witness on questions of law (p. 426).

96. The Court erred in overruling the introduction of the calculations of the witness Lange, as to interest, storage, freight on tare, insurance, local freight, on the ground that it was not shown to be connected with the 2000 bales of hops that were used for the Pabst shipment, and based on hearsay evidence and were conclusions of the witness in matters of law (p. 426).

97. The Court erred in refusing to strike out the answer to the following question asked witness Lange:

Q. What books did you have to examine to find the price at which the 2000 bales of Pabst hops were sold? (p. 426).

98. The Court erred in refusing to strike out the answer to the question:

Q. Did you figure any interest on losses as follows?

A. I figured the difference between the price we sold to Pabst and the price we sold to the other parties.

Because it is not responsive to the question and was necessarily hearsay, and also refusal to strike out portion of the answer to the same question reading as follows: (352)

'Most of the sales made of the 1920 bales of the 2000 bales were sold other parties after November 4, 1912, were sold on delivery prices.'

Because not responsive to the question and necessarily based on hearsay (pp. 426-7).

99. The Court erred in refusing to strike out the answer to the question:

Q. What is the aggregate of the miscellaneous charges, storage, local freight, cartage, sampling, repairing and any other charges you could have vouchers for?

The answer being in substance as follows: 'We know just what lot those items cover.' It not being responsive to the question and being necessarily hearsay (p. 427).

100. The Court erred in overruling the objection to the question asked witness Lange:

Q. What is the aggregate of miscellaneous charges consisting of storage, local freight, cartage, sampling and other charges like that which you could have vouchers to cover?

The substance of the answer being, that he figured interest at six per cent, the sale being the 1920 bales sold other parties after November 4, 1912, on delivery prices and that there was various freight rates covering these sales: there was freight on tare and items of storage on hops on November 4th on and there was one per cent discount allowed certain brewers and that there was certain bad accounts due and uncollectible, the difference between the

amount of the invoices and the amount collected (pp. 427-8).

108. The Court erred in permitting any testimony based upon the books of the plaintiff because there was not evidence introduced to show that the books were regularly kept. On the contrary the evidence showed that many of the entries were made temporarily to be subsequently changed, and because one of the persons who made the entries in the Chicago and New York offices testified as to the correctness of the records, nor that the entries were made simultaneously, with the transactions, nor that they were correct transcript of original entries made simultaneously on about the time of the transactions in question" (p. 429).

Error as to Incorrect Method of Keeping Books and Neglect to Introduce Books.

"109. The Court erred in allowing any of the entries in the books until they were shown to have been made by some person who knew whether the expenses were incurred concerning bales which has been designated as part of the Pabst sale or other bales and for that reason none of the evidence concerning the entries made in the books because of reports from the Chicago and New York office were material and the Court erred in permitting testimony to be introduced as to deduction drawn from the entries made through such reports (p. 429).

110. The Court erred because it did not require plaintiff to first prove that the entries made in the books were made contemporaneous with the facts to which they related and that they were made by parties having personal knowledge of the fact who corroborated by their testimony that the entries were proper and because many of the entries were made

from January to the first of June, 1913, at a time when but a very small portion of the Pabst so-called hops remained unsold, for instance, in the month of June, less than 16 bales remained unsold and yet the entire expense of the Chicago and New York offices were declared to be connected with the sale of said 16 bales and the expenses prorated in connection therewith (p. 430).

111. The Court erred in permitting witnesses Lange and Horst, who were not familiar with the work actually done and expenses actually made to determine what was the proper portion of prorating of the expenses of the offices in New York and Chicago as between so-called Pabst goods and other goods and the general carrying on of the Horst business (p. 430).

112. The Court erred in permitting the testimony of the witnesses of plaintiffs Lange and Horst referring to the books without requiring the books themselves to be introduced in evidence concerning the sales which plaintiff's witnesses testified to were made by the process of taking a portion of the air-dried hops which were on hand on November 4, 1912, and applying them to contracts which were in existence theretofore, without permitting to defendant to introduce the prices thus obtained for these goods so that the jury might have an opportunity of determining whether a reasonably careful man would have considered these sales as being on the Pabst account as against other sales, selected by plaintiff after the sales took place (pp. 430-1).

114. The Court erred in permitting witnesses Horst and Lange to testify concerning the expenses of the 1300 bales which were claimed to have been sold on the Pabst account, because these witnesses were not shown

to have had any data on which to base a proper prorating of the expenses for the sale of these particular goods with the other goods some of which were of similar character and some of which were of dissimilar character, and because the necessary prorating carried with it conclusions of law as to the manner of application of expenses under the circumstances which existed at various times from November, 1912, to June, 1913 (356) (p. 431).

115. The Court erred in refusing to strike out the testimony of witness Horst with reference to the price for which Pabst's 2000 bales of goods were sold because no portion of the 3062 bales on hand November 4th, were designated as Pabst goods or as being used by him for the purpose of completing the Pabst contract and because after all the goods were sold and 1760 bales being used to fill contracts which were in existence on November 4th, and more than a year after the sale, segregation was made empirically selecting the sales at the lowest price as on Pabst account (p. 432).

116. The Court erred in refusing to strike out the testimony of witness Lange concerning the losses because of bad accounts, because the same were irrelevant and immaterial and based on hearsay evidence. The witness Lange knowing nothing about the conditions under which the sale took place and the manner of attempted collection (p. 432).

118. The Court erred in refusing to strike out the answer to the question asked witness Lange:

Q. What service, if any, did the stenographer perform, with reference to the Pabst goods, if you know of your own knowledge?

The answer being: 'You are segregating an item according to the Pabst goods when all of the services were rendered for all of the goods

that were sold at that time.'

Counsel asked witness Lange:

'Q. Do you know what services he performed if any, with reference to the Pabst goods at that time?

The COURT. I presume you are asking these questions for the purpose of moving to strike this out on the ground that he is testifying to hearsay.

Mr. POWERS. Yes.

The COURT. The motion is denied.

Q. Your answer would be the same as far as all of the other items are concerned of the New York office, would it not?' (p. 434).

119. The Court erred in denying motion to strike out testimony given by witness Lange when he was asked the question:

Q. All of your testimony with reference to these transactions during that period, regarding expenses of these eastern offices, is being given simply as a result of your examination of the books?

A. Entirely.

Mr. POWERS, moving as follows: I move to strike out all of this witness' testimony on the ground that it is based on hearsay (p. 434).

120. The Court erred in denying the motion that all of the evidence of witness Lange with reference to overhead charges be stricken out on the ground that it is not shown to be in any way connected with the Pabst Company goods or the goods that Horst set aside for Pabst Brewing Company or designated to fill the order of Pabst Brewing Company and was based on hearsay evidence and was a conclusion of the witness as to the particular amount that should be charged to Pabst goods based upon the matters that lay partly in law and partly in fact and calling for the opinion of the witness, and after witness Lange had

made the admission quoted in the last specification (pp. 434-5).

121. The Court erred in allowing the conclusion of the witness as to interest, storage, freight on tare, insurance and local freight because the same were immaterial and incompetent as they were not in any way connected with any hops that were set aside for the Pabst people nor any testimony of any person familiar with the facts as to any of the charges that were entered in the books.

122. The Court erred in refusing to allow witness Horst to get data as to rejections of hops made by the Pabst Brewing Company, offered in rebuttal of his testimony that the Pabst people had been in the habit of making rejections (pp. 435-6).

123. The Court erred in refusing to strike out the testimony of the witness Horst in reference to the 2000 bales belonging to Pabst on the ground that his only knowledge of sales was by reference to records of sales not made by the witness himself, and with which he had no connection and which were not properly in evidence (p. 436).

125. The Court erred in denying defendant's motion to strike out the testimony of witness Lange as to the shipment of goods after they arrived in Chicago and New York, because the testimony was all necessarily hearsay (p. 437).

135. The Court erred in permitting the witness Horst to testify by the use of extracts from books in tabulated form, and permitting witness Lange to testify from the contents of the books none of which were produced in evidence and in ruling that the defendant was compelled to verify the facts from cross-examination after they had been given an opportunity of examining the books (p. 440).

136. The Court erred in permitting the witness Horst to testify as to the sale of goods which were held by plaintiff for defendant because there was no evidence to show that any specific goods were those held and because also the evidence of sales and all prices obtained from sales of these goods were only known to said Horst by examination of vouchers and statements of third parties about which he had no personal knowledge (p. 440).

140. The Court erred in overruling the objection to the question asked witness Lange: 'Beginning on November 4, 1912, until you finished selling the remainder of the bales, about 1300 and some odd bales, were there certain expenses incurred in New York and Chicago and Eastern States in selling the remainder of the 2000 bales of what we call the Pabst hops and other hops?' (p. 441).

141. The Court erred in overruling the objection to the question asked witness Lange: 'Did the corporation of E. Clemens Horst Company pay these expenses and these salaries based on these statements?' (p. 441).

142. The Court erred in allowing in evidence calculations of witness Lange on interest, storage, freight on tare, insurance, local freight'' (Exception No. 58) (p. 442).

As to Segregation of Two Thousand Bales.

144. The Court erred in sustaining the objection to the question asked witness Horst: Q. What bales of Cosumnes had you then (November 4, 1912) already set aside for contracts then in existence?'' (p. 442).

And also in sustaining objection to the following question, viz.:

"5. What did you do with these 2000 bales of hops that you sold to the Pabst Brewing Company and that they refused to accept? (Exception No. 7) (p. 391).

12. Q. Asked witness Horst: What steps, if any, did you take to set aside that 2000 bales for the Pabst people on November 4, 1912, when the defendant notified the plaintiff that they would not take the hops offered? I want to know whether plaintiff segregated any hops at that time for the Pabst people (p. 393).

14. Q. Did you have any other hops on hand, save and except these 2900 bales of your own Cosumnes raised hops with which to fill the contract that had been accepted? (p. 394).

59. Q. Asked witness Lange: Was there any act done by the Horst Company so as to segregate 2000 of the 3000 bales after November 4th, so that any person other than the Horst people themselves could determine which of the 3000 bales were to be considered as Pabst goods, and sold on the Pabst account? (Exception No. 50)" (p. 412).

Also question asked witness Conrad:

"58. Q. Asked witness Conrad: Was there any reason why plaintiff's hops should have sold at less figure than anybody else's that year?"

Also question asked witness Horst:

"60. Q. Was it necessary to maintain an office in New York with a manager's salary at the sum of $500 per month in order to sell 16 bales of Cosumnes hops? (Exception No. 51).

61. Q. What was the expense of the New York office for salaries while those 16 bales were on hand to be sold on June 1st? (Exception No. 52).

62. Q. How many of the Pabst goods were on hand unsold on January 1, 1912?"

As to Refusal to Allow Testimony as to Market Value of Hops by Experts.

The Court erred in overruling objection to question asked witness Marks:

"63. What would be the reasonable market value of a hop of the character of samples 1 to 20 if it were choice, in the month of November, 1912?

66. Q. What would be the reasonable market value of choice air-dried Cosumnes hops at that time, dried in accordance with the process, whereby drying was made by forcing air from the outside in through the hops?"

Also to questions asked witness Marks:

"64. Q. Suppose you cut the price to 16¼ cents how long would it take you to have sold 2000 bales?

65. Q. Was the market in a position at that time, if the price of hops was cut down to 16 cents, to have taken 2000 bales, or not?"

Also question asked witness Sweeney:

"68. Q. Did you actually sell the Pabst Brewing Company some hops of a choice character in November, 1912, for their brewing purposes?"

The Court erred in sustaining objection to Pabst Company's question asked witness Horst:

"57. Suppose you cut the quantity of 2000 bales up into ten lots of 200 each, would they have been more salable?"

As to Errors in Curtailment of Cross-Examination.

"124. The Court erred in the ruling on a question asked witness Lange:

Q. You say there was a certain 2000 bales of hops on November 4, 1912, in certain warehouses of those bales on November 4, 1912?

A. I can show you some of the records. They are in several books. We did not bring them all here. I started out to do that with Mr. Farrell (p. 360).

Mr. Powers. I move to strike out the answer as not responsive to the question.

The Court. The answer is responsive to the question. I do not propose to permit you at this time to go into a detailed examination of all of these entries. You may pick out one or two items. I have no disposition to keep anything from you that you have called for in the proper way, but the Court has got to protect itself and the jury against the delay that would ensue from an examination of things of this kind in the courtroom that should have been examined outside.

Mr. Powers. I except the statement of the Court, because my understanding of the law is that when entries in books are referred to, that we have a right to examine those books.

44. Will you give me the deliveries and dates of delivery of Cosumnes goods that you made on your contracts which were in existence at the time of the commencement of the season in 1912?

101. The Court erred in refusing to allow the defendant to cross-examine witness Flint in the matter of whether certain hops were considered to be the best average hops of a district.

102. The Court erred in refusing to allow the defendant to cross-examine witness Fielder in the matter of the state of the Horst crop as to ripeness at the time they were picked.

103. The Court erred in instructing witness Sweeney to confine his testimony to air-dried Cosumnes hops.

41. I want you to state whether the 4500 bales were stored? (Exception No. 66). The testimony rejected was the means of establishing where all the goods manufactured by the plaintiff and which plaintiff claimed was capable of completing the delivery was stored, and in that way defendant would have been able to show that the plaintiff did not have 2000 bales on hand on November 4th.

46. Is it a costly matter to assemble the office force?

45. Also give me the price for which you sold the 3062 bales plaintiff had on hand on November 4, 1912, at the time of selling the 2000 bales on account of Pabst.

47. Will you give me the amount of the general expenses for the month of July, 1913, and then we can see how they differ from the month of June.

48. What allotment has been made to these various contracts when the Pabst contract was breached, according to your theory, November 4, 1912?

49. Kindly give us the amount the 1060 bales finally sold for.

50. Look up and see whether there was any reduction of prices to the brewers because of a rejection of Cosumnes hops in 1912.

51. What services, if any, did the stenographer perform with reference to the Pabst goods, if you know of your own knowledge?

94. Also the Court erred in refusing to allow witness Lange to tabulate a number of the 1912 air-dried Cosumnes hops from plaintiff's ranch which had been rejected and the history of each of the bales that had been designated as Pabst goods showing where they were stored."

As to Counterclaim.

The Court erred in instructing the jury that there was not sufficient evidence for them to entertain a demand for a counterclaim.

"2d. That portion in the following words, viz. (p. 387):

As to defendant's counterclaim, I advise you gentlemen of the jury, that there is no sufficient basis in the evidence upon which to rest a verdict for defendant on that demand, because the evidence showed that defendant was compelled to buy certain hops to complete its brewing operations, because it had relied on obtaining the hops under plaintiff's contract of choice character and the actual number of pounds bought and prices paid therefor were in evidence and it was for the jury to decide whether or not they were a proper claim against plaintiff."

As to Refusal to Give Instructions Concerning Modification of Contract from a Quality Contract to a Sample Contract.

The Court erred in refusing to give the following instruction reading as follows:

"3d. It is admitted that on October 12th, 1912, the plaintiff sent to the defendant a night let-

tergram signed E. Clemens Horst Co., of that date, which has been introduced in evidence; that the defendant replied to it by the telegrams, signed Pabst Brew. Co., dated Oct. 21st, 1912, which has been introduced in evidence; that the plaintiff replied to the last mentioned telegram by the letter of October 24th, 1912, signed E. Clemens Horst Co., which has been introduced in evidence. That on Oct. 18th, 1912 (320), plaintiff wrote to the defendant a letter signed E. Clemens Horst Co., which has been introduced in evidence; that the defendant replied to the last mentioned letter by letter dated Oct. 23d, 1912, signed Pabst Brewing Co., which has been received in evidence and that the defendant replied to the last mentioned letter by letter dated Oct. 29th, 1912, signed E. Clemens Horst Co., E. L. Horst, which has been received in evidence;

I instruct you that any contract which was entered into between the plaintiff and defendant between October 15th, 1912, and October 29th, 1912, was modified by the last mentioned correspondence. So that even if there was prior to October 15th, 1912, any contract between the plaintiff and the defendant by which the plaintiff was to sell and the defendant was to purchase two thousand bales of hops at the price of twenty cents a pound, plus freight at Milwaukee, or F. O. B. Pacific Coast, yet from and after this correspondence of October, 1912, it became the duty of the plaintiff if it would fulfill its contract to sell and deliver to the defendant two thousand bales of hops equal to the four samples of hops which the defendant had theretofore sent to the plaintiff and it also became the duty of the plaintiff, if it would fulfill its contract to furnish to the plaintiff before shipping or delivering to the defendant any of the said two thousand bales of hops to furnish to the defendant samples of the hops which it

proposed to ship, which samples were required to be equal to the said four samples sent by the defendant to the plaintiff and it was the plaintiff's duty to furnish these samples within a reasonable time after October 21st, 1912, and if you find that the plaintiff did furnish to the defendant the samples of the hops numbers 25 to 38 mentioned in the (321) said letter of October 29th, 1912, but that the last mentioned samples were not equal in quality to the four samples sent by the defendant to the plaintiff as aforesaid, or if you find that the plaintiff did not within a reasonable time after October 21st, 1912, furnish to the defendant samples of hops equal in quality to the said four samples sent by the defendant to plaintiff, then and in either of those events your verdict should be for the defendant'' (pp. 387-8-9).

As to Allowing Question Concerning Custom With Reference to Time of Delivering of Goods.

"132. The Court erred in permitting the testimony as to custom with reference to time of delivery because there was a definite fixed time for delivery made by Horst in one instance and was recognized by him in a draft of a contract submitted by him to defendant."

The Court erred in overruling objection to question asked witness Horst, as follows:

"2. Is there a practice or usage among hop buyers and hop dealers as to the delivery of hops when no time is specified (Exception No. 2).

3. If no time is specified in the contract for the delivery of hops and the hops are to be of a subsequent year's growth, is there

any practice or usage whereby the seller will have to the end of the shipping season, or if not, what time is he to fulfill the contract for the delivery of those hops?

8. State what in your opinion, was the reasonable price that you could have realized from the sale of 2,000 bales of air-dried choice Cosumnes hops, if sold in that quantity, in the month of February, 1913, at the nearest market?

11. Please state what was the market price that could be obtained in the month of February, 1913, at the nearest market for that class of hops in February, 1913 (Exception No. 11).

6. How many pounds does a bale contain?"

The Court erred in overruling objection to question asked witness Horst:

"137. Were you able or not to deliver out of the 4,300 bales you have specified the 2,000 bales of hops for the purpose of filling the contract for Pabst Brewing Company, of the quality which the contract called for? Which was modified by the Court by adding thereto 'of the quality which the contract called for'."

In overruling objection to question asked witness Horst in rebuttal:

"147. Q. In your testimony, I asked you certain questions as to your ability to deliver 2,000 bales of hops equal to the samples 1 to 20. I now ask you if, on November 4th, 1912, you had 2,000 bales of hops on hand equal in quality to samples 21 to 24."

As to Error in Allowing Growers to Testify as to Commercial Value.

The Court erred in overruling plaintiff's objection to following questions:

"32. Q. Asked Paul E. Peterson: Look at the samples of the hops and state to the jury whether you consider them in your opinion choice hops.

33. Q. Asked witness Conrad: What would you say as to the quality of the crop of 1912, the 4300 bales, as to being choice hops or not?

36. Asked witness Zepfel: State whether samples 1 to 20 were choice hops.

37. To the question asked witness Theodore Eder: What have you to say as to the quality of hops raised by Mr. Horst in the Cosumnes District in 1912, as being choice or otherwise?

138. The Court erred in denying the motion to strike out the testimony of witness Peterson, that the samples of hops from the Horst ranch shown him, were choice hops, because it called for the conclusion of the witness, and the witness was not shown to be an expert on the subject and admitted that he did not claim to be such an expert.

126. The Court erred in refusing to allow witness Sweeney to testify concerning whether or not Pabst Brewing Company had the reputation of rejecting goods and although Mr. Powers offered to prove that the only goods ever rejected by Pabst were the Horst goods (Exception No. 81)."

As to Testimony of Witnesses Chalmers and Traganza and Concerning Observations as to Manner of Picking Hops by Horst Company.

The Court erred in sustaining defendant's objections to the following questions asked witness Chalmers:

"72. What was said to you by the man in charge with reference to the manner of bailing the hops so far as the leaves and twigs were concerned?

73. Q. Asked witness Chalmers: While you were at the Horst hop house and seeing the picker at work in the manner in which you state, did the man in charge say anything to you about the manner in which he was picking hops so far as the leaves and stems were concerned?

74. To the question asked witness Chalmers: Was anything said by the man concerning instructions, because of certain goods that were to be used to fill an eastern order?

76. Asked witness Chalmers: What, if anything, was said by the man in charge of the picking machine concerning instructions with reference to hops that were going into the picking machine?

78. The Court erred in sustaining objections to all questions asked witness Chalmers covering the operations of plaintiff's picking machine.

79. The Court erred in striking out all of the testimony of witnesses Chalmers and Traganza during the argument of the trial of the case. The character of this testimony is set forth in the last six specifications herein.

85. Also to question asked witness Traganza: Did the man in charge of the picker, state what his instructions were with reference to handling the leaves and stems?

104. The Court erred in making an order striking out the testimony of witness Chalmers to the question:

Q. What did you observe about the picking machine on the Horst ranch? and in saying, 'You will find that he does not know anything about whether they went into these hops or not'.

105. The Court erred in refusing to allow witness Traganza to testify to what he saw concerning the hop picking plant in operation at plaintiff's plant, in August, 1912.

128. The Court erred in refusing to allow the testimony of witness Chalmers concerning the leaves and stems going into the hops which were being dried because the testimony showed that all of the hops thus being dried were plaintiff's air-dried Cosumnes hops, that all of the bales were being handled in the same way and witness Horst had testified that with the exception of a small number of bales which were separately clean, that the remaining bales were all baled in the same way, and sold in the same way and consequently any way which showed the manner the leaves and stems entered into the bales was material evidence for the Court to know.

130. The Court erred in refusing to allow the evidence offered by witness Chalmers with reference to the state of the hops picked by plaintiff in August, 1912, concerning greenness and unripeness, because the testimony of the witness was that the hops in the samples 1 to 20 were unripened and this evidence tended to corroborate the evidence of the other witnesses and to contradict the statement of plaintiff's witnesses, that the hops were picked properly and were proper in color and were choice.

131. The Court erred in striking out the testimony of witness Chalmers on the subject

of the stems and the statement of the party in charge of the picking machine and as to greenness of the hops because all thereof was material as corroborative of the expert testimony of defendant's witnesses and rebuttal of the testimony of plaintiff's witnesses."

As to Testimony as to Immaturity and Greenness of Hops When Picked.

The Court erred in sustaining objection to question asked witness Chalmers:

"77. Q. Do you know about the relative time that hops usually ripen?

75. Q. At that time you say you were employed taking care of your crop?"

The Court erred in striking out the testimony of witness Chalmers with reference to the greenness of hops during argument of case by counsel and stating that witness did not know anything about what he was testifying:

"148. The Court erred in interrupting attorney Powers while arguing for the defendant and striking out the testimony of witness Chalmers concerning the greenness of the character of the hops at the time they were picked by the plaintiff."

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## Argument of Points.

TESTIMONY AS TO PRICE AND SALABILITY OF COSUMNES HOPS THOUGH NOT AIR-DRIED WAS IMPROPERLY REFUSED.

The correspondence and acts of the parties referred to herein show that the final contract between the parties was a sale by samples of 2000 bales

of Cosumnes hops equal to type samples 21 to 24, hence all of the evidence with reference to the value of any Cosumnes hops, though not air-dried of the Horst process was admissible because,

First. The parties themselves so construed the contract by contemporaneous action; that is to say, Horst submitted samples 25 to 38 which were not all air-dried hops.

Horst on direct examination (p. 81) said concerning them, "among them there are other hops. They are not all air-dried Cosumnes hops". Lange testified to the same effect.

Second. The type samples 21 to 24 were admittedly not "air-dried".

Consequently the several rulings of the Court, refusing testimony with reference to the Cosumnes hops that were not "air-dried" by the Horst process, were error.

In November, 1912, Horst was taking "whatever he could get as fast as he could get it" for his hops even as low as 14 and 14½ cents (pp. 76 and 77), and the Court refused to allow Pabst Company to prove that he bought Cosumnes hops at the same time for 17 cents.

All witnesses testified that commercially speaking air-dried and kiln-dried were the same; that the same price was paid for both kinds of hops and that no person could tell the difference between hops cured by air-dried process and hops cured by kiln-dried process, after they left the kiln.

And they had the same value.

The price actually paid by Horst for Cosumnes hops even if they were not air-dried was material for three reasons:

First. It showed the price of hops to a dealer in the Sacramento market in November, 1912.

Second. It showed that there was a demand for Cosumnes hops at that figure.

Third. It showed that Horst himself was selling air-dried hops for less than the figure which he paid for other Cosumnes hops, thereby demonstrating that the hops disposed of by him at 14 and 14½ cents for Pabst were either inferior in quality or were not being sold with proper discretion.

The pleadings conclusively show that Pabst Company (p. 29) alleged and Horst Company joined issue on the question (p. 37) as to whether there was a contract for sale by type samples not "air-dried", hence all such evidence was admissible so that the jury could decide the issue thus joined.

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**PABST COMPANY WAS PREJUDICIALLY AFFECTED BY THE INSTRUCTIONS OF THE COURT TO THE JURY TO THE EFFECT THAT THE ORIGINAL CONTRACT BETWEEN THE PARTIES WAS NOT MODIFIED BY THEIR SUBSEQUENT CORRESPONDENCE AND CONDUCT.**

**THE JURY SHOULD HAVE BEEN ALLOWED TO PASS UPON THE QUESTION OF MODIFICATION OF CONTRACT.**

During the trial of the case, the Court said (pp. 93-4):

> "The Court will instruct the jury what is necessary to make a contract and the jury will

> determine from the evidence whether the contract was made. The Court will also instruct the jury what will amount to a modification of that contract and the jury will see whether it was modified or not according to the evidence."

In this last ruling the Court correctly stated the law because all questions arising as to whether the contract was changed by the acts of the parties was for the jury to decide under proper instructions.

> Anndall v. Union etc. Co., 165 Ind. 110, 74 N. E. 693-94 and cases cited;
> Halsey v. Darling, 21 Pac. 913;
> Gassett v. Galzier, 43 N. E. (Mass.) 193-195;
> McNamara v. Michigan Trust Co., 111 N. W. 1066;
> Pacific Export Lumber Co. v. Northern Pacific Lumber Co., 80 Pac. (Oregon) 105;
> Galey v. Van Ostrand, 114 N. W. 817;
> Etting v. U. S. Bank, 24 U. S. 67;
> Pence v. Langdon, 99 U. S. 578-81;
> Marreda v. Silsbee, 62 U. S. 146.

Relying upon that ruling Pabst Company tried the case on the theory that the jury was to find whether the contract was modified.

However, the Court subsequently abandoned this ruling. The Court instructed the jury that the contract was not modified as follows:

> "This contract was in no respect modified or changed by the subsequent correspondence or negotiations of the parties" (p. 368).

This was excepted to by Pabst Company at the trial in accordance with the rules.

As a matter of law when Horst Company on October 29, 1912, sent samples 25 to 38 as an offer of hops equal to type samples 21 to 24 it abandoned prior negotiations and adopted the contract based on type samples.

Industrial Works v. Mitchel, 72 N. W. 25;
Brown v. Guaranty Co., 128 U. S. 403-415;
Northwestern Cordage Co. v. Rich, 67 N. W. 298.

"A contract may be discharged either by the making of an entirely new and independent contract relating to the same object, or merely by the introduction of new terms. In the latter case the new contract consists of the new terms and so much of the original contract as remains unchanged. If, for instance, parties who have contracted for the construction of a building according to specifications, and at a price, to be paid partly in cash and partly in some other way, should afterwards agree upon a change in the specifications and an increase in the cash payments, there would be substituted for the original contract a new contract, consisting of the new terms and the unchanged terms of the original."

Clark on Contracts, Sec. 229, Page 420;
Brown v. Everhatd, 52 Wis. 205, 8 N. W. 725;
Teal v. Bilby, 123 U. S. 572-578;
Waugenheim v. Graham, 39 Cal. 169;
Kingham & Co. v. Watson, 97 Wis. 596;
Chesapeake etc. Co. v. Ray, 101 U. S. 522;

West v. Platt, 127 Mass. 372;
Holloway v. Frick, 24 Atl. 201 (Penn.);
Beach on Modern Law of Contracts, p. 950, and cases cited;
Gray v. Foster, 10 Watts (Pa. 280);
1 Beach on Contracts, p. 907, Sec. 771;
Green v. Wells, 2 Cal. 584-585;
Bell v. Staacke, 141 Cal. 186 at 201;
Keith v. Electrical Co., 136 Cal. 178 at 181.

Inasmuch as the second lot of samples were not all choice air-dried Cosumnes hops (Mr. Horst's testimony, p. 91) and the selection by the Pabst Company of any of these samples would have been compliance with the contract as modified and would have been binding on both parties, and having in mind that the original attempted contract was for choice Cosumnes air-dried hops and not a sample contract, the agreement was necessarily modified by the acts of the parties occurring after 1911.

Tested in another way if the Pabst Brewing Company had accepted the second lot of 14 samples as equal to the four samples which by the agreement supplied a new standard under the contract, the Horst Company would not have had a cause of action against the Pabst Company because of its rejection of the first lot of samples, 1 to 20 and the hops then delivered would not have been "air-dried" but Cosumnes of any kind equal to samples either 21 to 24 or 25 to 38.

It is impossible to state whether the verdict of the jury was based upon the proposition that the rejection by the Pabst Company of samples 1 to 20 was a breach of the contract or whether its rejection of samples 25 to 38 as not equal to the four samples was a breach.

Both lots of samples were submitted to the jury upon the same issue while in fact samples 1 to 20 were not in issue because of the modification of the contract and because they were never tendered to Pabst Company as being equal to type samples 21 to 24.

If rejection of samples 1 to 20 was a breach it was waived by the Horst Company in continuing negotiations and reopening the subject matter for further dealings.

Brown v. Guaranty Co., 128 U. S. 403-415.

In the face of the rulings as to air-dried hops during the trial, which are quoted herein elsewhere, it was incumbent upon Pabst Company in making its defense to be prepared upon each issue.

Not knowing in advance what the position of the Court would be in respect to modification, it was incumbent upon Pabst Company to be prepared upon all the issues.

The fact that depositions were taken prior to the trial by Pabst Company which related to both sets of samples did not make that deposition evidence and the same was not evidence until introduced in open Court.

If the Court had ruled during the trial that the contract had been modified, the evidence of samples 1 to 20 would have been immaterial and would not have been used by Pabst Company and the use thereof might have been properly objected to.

In view of the situation we most respectfully urge that the rulings referred to were most prejudicial errors.

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AS TO COUNTERCLAIM.

The ruling of the Court confining the testimony to "air-dried" hops and that the contract was not modified to a "sample contract" destroyed Horst Company's opportunity to establish its counterclaim because this counterclaim was based upon the theory that the contract had been modified to a sample contract and that the goods offered were not up to type samples and that they were compelled thereby to pay over twenty cents for the hops which they were compelled to buy to fill their necessities in the brewery for the year 1912-3.

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IT WAS ERROR TO REFUSE THE INSTRUCTION REQUESTED BY PABST COMPANY THAT THE LETTER OF OCTOBER 29th CREATED A "SAMPLE CONTRACT" IN PLACE OF "QUALITY CONTRACT".

After the forwarding of the samples 25 to 38 and the letter of October 29, 1912, by Horst Company, the contract between the parties became that which is set forth in the instructions requested by

Pabst Company (pp. 381-2). The contract then became one of delivery by samples like type 21 to 24.

In other words, from and after the receipt by Pabst Company of samples 25 to 38 and the letter of October 29, 1912, the condition that the hops should be "air-dried" of the Horst process was eliminated.

The contract on the new terms of deliveries equal to samples like 21 to 24 included necessarily an abandonment of the old contract based or air-dried characteristics.

Equal to
~~Chesapeake~~ v. Ray, 101 U. S. 522;
Waugenheim v. Graham, 39 Cal. 169;
Gibson v. Donnelly, 13 N. Y. Supp. 808;
1 Mecham on Sales, Sec. 803.

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**HORST COMPANY WAIVED ITS RIGHT TO ELECT TO USE SALE PRICE OF TWO THOUSAND BALES AS BASIS OF DAMAGES.**

When Horst Company received Pabst Company's message refusing to accept the tendered samples 25 to 38 as a delivery equal to type samples 21 to 24 then, if the hops represented by 25 to 38 entitled it to such delivery, Horst Company had a cause of action.

Horst Company then had three remedies open to it:

First. To take 2000 bales of hops, equal to 25 to 38, place them in a warehouse and notify Pabst Company that it had the hops on hand ready to deliver to them and tender them the delivery of them and then sue for the entire contract price of twenty cents a pound.

Second. To set aside the 2000 bales and sell them for the best obtainable price for and on account of Pabst in the nearest available market.

Third. To sue Pabst for the difference between the market value of the hops on the date of the refusal and the contract price.

Horst Company's actions from November 5th on established the fact that they abandoned both the first and second elections as to remedy and at the time of the commencement of the action intended to rely on the third method.

Under date of October 18, 1912, they had written (p. 67):

> "We feel that the fair plan that should be most equitable to you will be to agree upon a difference in price to be paid us on the 2000 bales. To arrive at that amount, we should get, if market had not changed, the fair profit as between the simultaneous buying and selling prices, and as market has declined we should get in addition, the decline in the market, but if you think that this is asking too much we are ready, subject to our confirmation within three business days after receipt of our reply, whatever may be the difference between the contract price and any figure you offer us now on 2000 bales 1912 hops equal to the four samples you sent us, or to the selection of the 20 we sent you." * * *

No suggestion made was accepted by Pabst Company after the rejection and no other suggestion was made by Horst Company and nothing was done by the parties with reference to establishing or determining the manner of remedy.

After the so-called breach Horst Company continued to sell their goods in their usual manner without any attention whatsoever to the Pabst Company's transactions. Suit was brought on the theory that there had been a loss of eight cents a pound on 200 bales of hops for each bale of the 2000 bales. In other words $32,000.

When Horst Company began to prepare testimony for the trial of the case, however, they changed their plan of campaign and attempted to elect as a basis of damages that they had sold 2000 bales for and on account of Pabst Company at a loss. Some of these goods had been theretofore offered to other brewers and rejected and were in New York, Milwaukee and Chicago; some of them had been sent from one warehouse to another.

As illustration, Mr. Lange testified (p. 196):

> "There were two lots 523 and 524 in the Sibley warehouse. They were designated as Pabst goods by the Horst people.
>
> Q. When were they made the basis of any charge against the Pabst account?
>
> A. When we made up our list of sales on the 2000 bales. Just since we have been getting up the statements of the account you have asked for."

In other words after the sales had all been completed Horst Company attempted to elect as their method of proving damages, that they had become the gratuitous bailee for the Pabst Company of 2000 bales of their own "air-dried" Cosumnes hops, and that they had sold these 2000 bales for and on account of the Pabst Company, notwithstanding they had done nothing to establish the identity of these 2000 bales by any act.

At the time of the alleged breach of contract nothing was done by the Horst Company to identify any 2000 bales as Pabst hops.

They continued their business in the same way as they had been conducting their business and delivered portions of the hops that were on hand at that time to various customers upon contracts which were in existence on November 4, 1912, and sold some of the hops to the public through their New York and Chicago offices.

They thereby abandoned all right to estimate their damages on the basis of expenses in selling any 2000 bales.

Had they earmarked any 2000 bales as Pabst goods on November 5, 1912, they would have become gratuitous bailees of them. Had they thereafter intermingled them with their own 1062 bales they would have so acted as to have made themselves purchasers of these 2000 bales.

Their actual conduct practically accomplished this result. Pabst Company was entitled to a credit

on that day of the market value of said 2000 bales, which is in evidence to be from 17½ to 19 cents.

Practically all of these so-called Pabst hops were sold prior to February, 1912 (p. 79), and yet an establishment paying $100 a month rent in New York and $20 in Chicago, which included a head salesman at $500 per month in New York and one in Chicago office at $350 per month, was continued and at the trial of the case the cost of its maintenance was charged partly to Pabst up to July 1, 1913, although there is no entry in Horst Company's books of any such charge and the evidence was allowed over Pabst Company's objections.

Had there been no Pabst contract whatsoever, the New York office and Chicago office would have been compelled to have had these managers and pay said rent and other expenses.

On November 4, 1912, Horst had on hand 10,500 bales of hops of which they claim 3062 were "air-dried" and a large number of contracts with purchasers throughout the world at prices ranging from fourteen to twenty-six cents. Some of these contracts had been filled before November 4th, and some were filled after November 4th. When Mr. Lange, who acted as the bookkeeper's assistant for Horst Company began to make computation to introduce evidence in the trial of this case 494 bales, which had been allotted to these contracts before November 4th were treated as "Pabst hops" and 1062 of the bales which were

allotted to these contracts were treated as Horst hops. The only reason for the classification was a desire to make the so-called Horst damages as large as possible.

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**COMPILATIONS BY SAN FRANCISCO ASSISTANT MADE FROM REPORTS OF NEW YORK AND CHICAGO OFFICE NOT SWORN TO WERE INADMISSIBLE BECAUSE: 1. BASED ON HEARSAY EVIDENCE; 2. BECAUSE THE BOOKS THEMSELVES WERE NOT INTRODUCED; 3. BECAUSE NO PROOF WAS MADE THAT THEY WERE PROPERLY AND ACCURATELY KEPT—ON THE CONTRARY THE PROOF IS THAT MANY ENTRIES WERE ONLY "APPROXIMATE" AND NOT INTENDED TO BE CORRECT; 4. NO NECESSITY WAS SHOWN FOR DEPARTURE FROM THE USUAL RULES OF EVIDENCE IN THEIR INTRODUCTION.**

Witnesses Lange and Horst were the only persons testifying as to the sales price and costs and expenses for sales. Their testimony was based upon written reports made by unknown persons whom the jury never saw and who were never sworn or cross-examined.

The jury never saw the books. The witnesses testified that none of the reports reported any charge against Pabst Company that was entered in the books.

Hence the reports were hearsay to the witnesses. The reports were made by the managers of the Chicago office and the New York office—both of these men could have been produced as witnesses. Had they been produced Pabst Company could have

cross-examined them as to the connection of each item of expense with the Pabst goods, with the other Horst goods, with Horst Company's future business and with the plan to hold business in the future and the like.

All compilations based upon entries thus made were of course vitiated for the same defect.

The witness Lange did not know what prices were obtained except by hearsay.

He did not know which 2000 bales was set apart as having been sold to Pabst, except by drawing conclusions concerning the legal effect of certain acts of Mr. Horst by way of applying sales to the Pabst account over a year after the transactions took place.

This error is also shown by the objection to the question asked witness Lange:

> "Have you made an examination of the books for the purpose of ascertaining the price at which they (the 2000 bales sold to Pabst Company) were sold and the persons to whom they were sold?"

Witness had already testified that he knew nothing about the transactions personally; that no particular 2000 bales had been set aside to the Pabst people and consequently the examination necessarily was a compilation of unsworn-to records which to this witness was hearsay, and required the witness to exercise a conclusion of law as to whether or not any particular sale or expense item was

connected with the 2000 bales properly chargeable to Pabst.

Similarly the Court erred in refusing to strike out portion of the answer of witness Lange:

> "That the sale to the Pabst people was a coast price and most of the sales made of the 1920 bales of the 2000 bales were sold on delivery prices after November 4, 1912, delivered at a town where the brewery is situated."

This evidence was based upon the unfounded assumption that there was a certain 2000 bales belonging to Pabst Company and that he knew the prices reported were delivery prices or that the said prices were the market prices then prevailing at the place of sale.

The witness testified as if it were his own knowledge concerning deductions as to prices being "Coast prices" or "delivery prices" from so-called vouchers, which were merely unverified written reports of the New York and Chicago managers, about matters concerning which the witness had no personal information and which vouchers were not introduced in evidence.

Similarly the Court erred in overruling the objection to the question:

> "What is the aggregate of the miscellaneous charge for these 2000 bales?"

Witness Lange testified that no entries were made in the books as to any 2000 bales but that he had made an examination of certain sales of 3062 bales

shown in the books some fifteen or twenty months after the entries were made for the purpose of ascertaining the price at which they were sold and the persons to whom they were sold in order to segregate the items concerning the 2000 bales which he saw fit to consider Pabst goods.

In other words this case was decided on the conclusions of one of Horst Company's employees, employed not as bookkeeper but as special assistant to the manager, which manager testified that he prepared for this lawsuit from the time he commenced to pick these hops and this assistant was in no way connected with the transactions.

The conclusions of this assistant were not made at the time of the occurrence of the transaction but a short time prior to the trial of the case from data gained by going through books and compiling prices and expenses which he selected to be sales by Horst Company for and on behalf of Pabst Company without said assistant having any personal knowledge of the transactions as they occurred and using data about which Pabst Company never had any opportunity to cross-examine any person familiar with the facts to ascertain whether the transactions actually occurred, or the circumstances surrounding the several transactions.

It must be remembered that Horst Company does not claim that the men who actually made these miscellaneous charges attempted to connect any of

these expenses with any particular sales or any particular part of the so-called Pabst 2000 bales.

So with reference to the testimony as to bad debts and uncollected accounts, the witness testified that no portion of the Cosumnes goods were set aside as and for Pabst but that after the goods had been sold that so much of the Cosumnes air-dried goods as were sold and found to be bad accounts were shortly before the trial of the case charged to Pabst.

That is certainly conclusions of law based on hearsay and certainly importing into the contract an insurance of accounts that is no way connected with the contract in question and permitting the witness to draw conclusions of law from facts not in evidence.

It was not proper testimony.

When counsel for Horst Company attempted to cross-examine the witness as to the books, the Court by a series of errors refused to allow an examination in detail sufficient to establish the facts of the transactions.

Pabst Company were never permitted at any one time to have the books before them in Court so that there could be any cross-examination even as to the records made by the New York and Chicago offices which had been tabulated not by a bookkeeper but by the special assistant to Mr. Horst. Without the books cross-examination of the compiled statements was impossible.

We respectfully submit that all of the testimony with reference to the so-called entries in the so-called books were introduced in flagrant disregard of the fundamental principles of requiring primary evidence when it is possible to be had.

Horst Company's attempt to take advantage of the new theories as to the necessity of business where a great number of entries are made by a great number of clerks in different places far from the place of trial requiring the Courts to be lenient in following the old rules as to hearsay evidence has demonstrated the extreme danger of the tendency of said theories.

The books were not offered at all. The extracts from them were not offered in such a way as to carry with the offer any safeguard of the entries having been made in the ordinary course of business.

On the contrary there was every indication that they were self-serving declarations specifically compiled for use as testimony in this case.

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**THE REASON FOR THE REFUSAL OF HORST WITNESSES TO PRODUCE THE BOOKS MUST HAVE BEEN THAT THEY DID NOT HAVE TWO THOUSAND BALES OF AIR-DRIED HOPS ON HAND NOVEMBER 4, 1912.**

The record shows that postponement after postponement was taken so that Pabst attorneys could cross-examine as to entries in the books the two Horst experts who had prepared the Horst case since the time of picking.

This was necessary because the Court had refused to require the books to be brought to Court and because no bookkeeper or any person connected with the transactions had testified and Pabst's counsel were attempting to find when the 494 bales allotted to Pabst were actually delivered to the customers and they were unable to ascertain anything except as to the 20 bales that were given to Hohenadel, although they were promised time after time that the records would be given from the books.

The reason for the said witnesses so evading giving the evidence was that as a matter of fact on November 4, 1912, Horst Company did not have 2000 bales of air-dried Cosumnes hops to deliver to Pabst anywhere either in California or anywhere else and they were presenting this fact being shown.

*They only had 1336 bales choice air-dried hops on November 4, 1912, as has been shown by the actual entries in the sales book for withdrawal* (p. 365), *and using the testimony* of the man who picked the hops as a basis for the number of hops actually picked.

This is also shown by the fact that Lange used 1346 bales as the basis for prorating overhead expense.

If there had been any more than 1346 bales on hand he would have used the larger amount.

In order to cover up this discrepancy Horst testified that he applied the balance of the Pabst goods to sales contracts already in existence.

To prevent the Court discovering the fact that he had used the said allotment for the said purpose of covering up the deficiency he evaded cross-examination as to the time the goods were delivered on the said 494 bales.

It will also be observed that even using the 494 bales thus allotted and the 1346 bales used by Lange in figuring the overhead there was only 1840 bales, or a discrepancy of 160 bales of Pabst's 2000 accounted for for Pabst until Horst finally made the figure 1503 bales in his testimony but not from the books.

This desire to cover up the transactions was also the reasov why witnesses volunteered that the entries of stock movements were only "approximate dates" (p. 234), and that the goods were oftentimes on hand when in fact the books showed by entries that they had already been shipped (pp. 234-235).

Again the reason why Horst refused to testify as to the sales of the 1062 bales allotted to contracts in existence, but not charged to Pabst was that the prices were in excess of twenty cents. If he had been able to have allotted any of these 1062 bales of contracts less than twenty cents he would have filled up the discrepancy of the 160 bales by making an allotment of 654 bales instead of 494 bales to Pabst Company.

EVERY REASON FOR STRICTLY ADHERING TO THE EXACT RULES OF REQUIRING PRIMARY EVIDENCE WERE PRESENT.

1st. Mr. Horst testified (p. 135):

> "I prepared for the lawsuit before we picked the crop. I have had considerable experience in litigation. I always prepare for lawsuits immediately on their appearing in sight. Whenever the market drops."

2nd. The managers of the Chicago and New York offices could have testified definitely and accurately as to the prices obtained at each sale and the connection of all expenses to the goods sold at each sale, but had they testified, Pabst Company would have had an opportunity to cross-examine them as to many matters including which of the goods had been rejected by other buyers—why certain of the accounts had not been paid, why expenses amounting to nearly $1000 were expended in June, 1913, when but 8 bales were sold and the usual facts connected with such transactions. This cross-examination Horst Company wished to avoid, hence Horst, the manager who prepared for this lawsuit before the crop was picked took good care not to take the depositions of any witnesses who could give any facts showing the actual transactions or the commercial character of the hops after they were cured.

3rd No books of original entry were kept in New York or Chicago.

4th. No bookkeeper keeping any books in San Francisco testified.

Mr. Lange who testified concerning his deductions from memoranda received from others testified (p. 142):

> "I handle the general office work and special work for Mr. Horst."

5th. Lange, himself, did not make these computations until after he began to prepare for the case as handler of "special work for Mr. Horst"; he testified (p. 196) referring to bales 523 and 524:

> "Q. When were they made the basis of any charge against the Pabst account?
> A. When we made up our list of sales of the 2000 bales. Just *since we have been getting up the statements of the account you have asked for.*"

6th. There were no entries made in any book at any time as to any charges to Pabst Company.

7th. The parties who offered the deductions from data made by others in Chicago and New York in lieu of primary testimony were specially careful to handle the entries in the books in such a way as to prevent effectual cross-examination.

One was Mr. Horst himself who had been preparing for this lawsuit since the hops were picked; and the other was Mr. Lange, the man who was designated to do his special work and who on cross-examination testified that 497 of the bales allotted to Pabst Company after November 4, 1912, were on prior contracts (p. 155).

Mr. Horst testified (p. 236) that the contracts filled for Pabst Company were those that had the lowest sales price on the contract.

And Mr. Lange testified that out of the 497 bales thus segregated, 20 of them had been already sold to Hohenadel.

In other words 20 bales claimed to have been sold to Pabst had been sold to Hohenadel and the record shows they were sold on August 23, 1912 (p. 267), over two months before the Pabst alleged rejection. Again Mr. Lange testified there were 1346 air-dried on hand charged to Pabst on November 4, 1912. Mr. Horst testified 1503 were on hand and so charged and the books show that only 4100 less 2764 or 1336 bales in all then remained unsold. These are but samples of the attempted deductions from said books. This shows the absolutely, hopelessly impossible self-serving character of this method of proving entries from books without the books being offered.

It necessarily violates every principle of law concerning the right of defendant to cross-examine.

It gives the proponent of a proposition a means to so prove his case that the defendant has no opportunity to ascertain the facts because the witness testifying could always shield himself from cross-examination on any testimony damaging to his case by honestly testifying that he did not know about the transactions.

In an almost identical case, the California Appellate Court said:

> "We are referred to no authority and we know of none holding that a party to an action may copy a book of original entry in his possession, withhold the original and prove his case by introducing such copy in evidence, while on the contrary numerous authorities hold such ruling to be error."

Campbell v. Rice, 22 Cal. App. 734-736.

In that case the bookkeeper testifying actually had charge of and copied the accounts between the parties and he testified that a bill of particulars prepared by him was a true and correct copy of a statement of account between the parties showing the amount due from defendant to plaintiff for labor and materials used in the work. He further testified that he copied it from his original order slips which were entered from the time books and pay rolls; that he did not have a book showing original entries but had original order sheets from which he made the statement after suit was commenced.

Plaintiff tendered the document in evidence, and the objection was made there as here; the Court refused the testimony, saying:

> "In the United States a tradesman's book of original entries is in most jurisdictions received in evidence as prima facie proof, when supported by the tradesman's oath (1 Wharton on Evidence, Sec. 678); and this rule, though not expressly declared, has the sanction of numerous authorities in this state (White v.

Whitney, 82 Cal. 163 (22 Pac. 1138); Landis v. Turner, 14 Cal. 573). The rule, contrary to the common law, had its origin in the necessity of cases arising where such books were the only evidence of the matter in controversy and were therefore the best evidence obtainable. Not only was this copy of the bill of particulars not the best evidence, but no necessity existed for its introduction, for it conclusively appears that the document was transcribed from order sheets, pay rolls and other data constituting a book of original entry (Hooper v. Taylor, 39 Me. 224; Rowland v. Burton, 2 Har. (Del.) 288; Kendall v. Field, 14 Me. 30 (30 Am. Dec. 728); Taylor v. Tucker, 1 Ga. 231) in the possession of plaintiff and which he might have produced, thus giving defendant and the Court an opportunity to examine it, in order to determine its integrity and correctness and giving to plaintiff an opportunity to explain any errors or discrepancies therein affecting its weight as evidence."

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**ADMISSION OF THE TESTIMONY AS TO WHAT THE BOOKS SHOW FROM COMPILATIONS WITHOUT THE BOOKS BEING INTRODUCED WAS PREJUDICIAL ERROR BECAUSE**

**(a) The Testimony Was Hearsay; the Books From Which Facts Were Taken Were Not Introduced In Evidence;**

**(b) If the Books Had Been Introduced In Evidence They Could Not Have Been Admissible Because Not Properly Authenticated.**

In an almost identical case the Supreme Court of California has held that certificates of an assayer to a mine as to the value of its ore was properly rejected when the assayer was not produced

and no evidence of the correctness of the certificates was furnished. The Court said:

> "The certificates were not of an official character, but were mere private statements and in legal contemplation were of no higher value than other hearsay testimony."
>
> People v. Whalen, 154 Cal. 472-477.

None of the sales in the New York office or the expense therein created other than the fixing of salaries of the principal employees was under the supervision of either Horst or Lange.

And under an almost identical state of facts the Court in the case last quoted, said:

> "The same considerations apply to the refusal of the Court to allow the witness Thomas Price to testify to the assays afterwards made by him in his assaying establishment, but not made by him or under his supervision and not under such circumstances that he had any personal knowledge whether they were correct or not."
>
> People v. Whalen, 154 Cal. 472-477.

It is customary where books contain many items to permit an expert or one familiar with them to draw particular account from the books and submit same in tabulated form, which is usually done by stipulation; it may be done by direction of the Court but the books must be introduced and proved and *the items comprising the calculation must be proved in accordance with the rules of law, otherwise the said tabulated statement is clearly hearsay.*

**(c) The Compilations Introduced In Evidence Were Self-serving Entries.**

**(d) The Evidence From the Books as to Overhead Charges Was Double Hearsay.**

The testimony of the witness that the entries from which he took the items particularly as to overhead charges was made up from statements and vouchers of agents is double hearsay as stated, first, because the books were not in evidence and, second, because of the unverified nature of the reports from which the entries themselves were made; third, because of the unverified connection of the expenses with the Pabst goods.

In Callihan v. Washington Power Co., 56 L. R. A. 772 the Court said as follows:

> "Independent of his own statement, there was no evidence that the letter was written when the transaction was recent, or that it had ever been in the hands of the plaintiffs. It may have been prepared with direct reference to this litigation. The case is not so strong as it would have been on proof by a third person that the witness had made similar declarations immediately after the business was transacted. So that, of course, if the testimony might have been prepared with direct reference to the litigation, it would fall under the objection of being self-serving testimony, and was properly overruled."

In the case of Watrous v. Cunningham, 11 Pac. 811-812, the Supreme Court of California says:

> "It does not sufficiently appear from the record that the account-book of the plaintiff offered in evidence was a book of original en-

> tries, in which the party offering it kept his accounts in the regular course of his business, or that the entries therein were made by him at the times they purport to have been so made, and contemporaneous with the transactions which they chronicled; nor did it appear that no other books of account were kept by him, and that he had no clerk or bookkeeper, or that he kept fair and honest accounts. Neither does it appear that the plaintiff was present, and made any entry in that account-book, at the time the alleged sale of the hogs took place, the title to which is in dispute. Therefore the account-book was properly held not to be admissible in evidence, as the necessary preliminary foundation for such admission, either as a book of original entries or as a part of the res gestae, had not been laid."

In the case of Kerns v. McKean, 65 Cal. 411, 18 Pac. 122, 123, the Supreme Court of California said respecting certain books of account:

> "But the evidence here offered was inadmissible under any rule. Patterson had a clerk. The entries were made by Hanna, Patterson's bookkeeper. And although, as shown by the statement on motion for new trial, Hanna was examined as a witness, it does not appear that he was questioned with respect to the entries; that he testified that they were made at the date of the transactions they purport to record, or that the entries he made were correct of his knowledge when he made them. Nor was it shown that the book was a book of original entries."

This was affirmed in the case of Kerns v. McKean, 19 Pac. 817.

> "Many laborers are employed, the accounts must, in most cases, of necessity, be kept by a

person not cognizant of the facts, and from reports made by others. The person in charge of the laborers knows the fact, but he may not have the skill, or for other reasons it may be inconvenient that he should keep the account."

In the case of Matko v. Daley, 85 Pac. 721, the Supreme Court of Arizona said:

"The paymaster of the Copper Queen Company testified, in substance that the records were the records of the company; that it was the custom of the company for the men to sign the pay rolls before they could get their money, and that it was necessary for them to do so; that these pay rolls were the pay rolls for December; that they were signed by men who had worked for that month; that he was not present when they were signed; that he could not testify that the signatures were the signatures of Brain or Seffer; only that the signatures purported to be their signatures; that the writing in the body of the pay rolls was in the handwriting of the former paymaster of the company; that precautions were always taken by the company to see that the person who signed the payroll was the person to whom the money was due. We do not think that sufficient proof that the signatures were in fact the signatures of these men was offered to warrant the receipt of these documents in evidence. Furthermore, the evidence at best was but hearsay and inadmissible."

In the case of Price v. Standard Life & Accident Ins. Co., 95 N. W. 1118, the Supreme Court of Minnesota said:

"2. At the trial an objection was made and overruled to the introduction in evidence by

the defendant of the register of patients kept at the Northwestern Hospital, with the entries therein relating to the insured. These entries were made by the superintendent in charge, who was a female physician, in the usual course of business at the hospital, and showed when the patient entered, when he departed therefrom, and the nature of the disease from which he was said to be suffering. This superintendent produced the register, and testified that the entries concerning the insured were made after Dr. Kimball, the physician in charge had observed the case long enough and knew sufficiently about the patient to state the kind of disease, and were wholly based upon information received by her from the doctor. The witness had no personal knowledge of the patient, and had no recollection of the case, apart from the record. Therefore the entries amounted to nothing more or less than what the superintendent wrote in the register what the attending physician told or reported to her concerning Price's illness. To permit these entries to be introduced in evidence was to disregard in a very noticeable manner the rule forbidding the introduction of hearsay evidence, as well as the spirit of the statute which prohibits the examination of a physician as to certain matters without the consent of his patient (Gen. St. 1894, Sec. 5662), although this last objection does not appear to have been made at the trial. * * * But the entries did not even rise to the dignity of a repetition of what the doctor said to a third party, for the superintendent remembered nothing except that she made entries. This testimony should have been excluded."

In re F. Dohmen Company v. Niagara Fire Insurance Co., 96 Wis. 38, it is said:

> "The most that can be said is that he had a general familiarity with the business as it was transacted. There is nothing to show that an inspection of the books refreshed his memory and recalled previous actual knowledge of such transactions, or that he at any time knew that the books were correct; yet his general knowledge was such as to satisfy one, ordinarily, of such correctness. There a person is engaged in and has general knowledge of an extensive business; has personal charge of it much of the time; has a regular system by which all the transactions go to the bookkeeper to be there recorded; and is in the habit from time to time, of referring to such books while many of the matters of which he has personal knowledge are fresh in his mind, or when, though such matters are forgotten an examination of the books brings back the previous knowledge of the facts; and where such books by such use, are found to be uniformly correct, and are further shown to be corrected by their daily use in settlements with customers, on proof of such facts, together with evidence by the bookkeeper that all transactions were correctly recorded by him as they were reported for that purpose from day to day in due course of business, such person may testify, by their aid, to the transactions recorded in such books as facts.
>
> *Here there was no proper foundation for the use of the books. They were merely produced as the books of account kept in the business, and without any verification whatever, the witnesses were allowed to testify respecting their contents. There is no rule with which we are familiar that warranted the admission of*

*the evidence under the circumstances. It was prejudicial error, for which the judgment must be reversed.*"

In Chicago Lumber Co. v. Hewitt et al., 64 Fed. 314, 316, Lurton, Justice, said (but in this case the books were not introduced):

> "The ruling under which the book kept by the witness McFadden was admitted as evidence seems to have been rested upon the ground that the evidence of the facts sought to be proven which it was in the power of the plaintiffs to produce. It is true that the book is one which had been kept by the witness, and the entries offered had been all made by him. But it is *equally true that the data upon which these entries had been made had been obtained from another, and that the witness had no such personal knowledge as to the correctness of these data as to enable him to say anything more than that he had correctly recorded the results obtained from data furnished by another.* McFadden's book was not even a copy of the temporary memoranda made by Foley. Foley's data constituted a detailed statement as to the number, length and lumber contents of each log placed in the river during the day; while the book entry showed only the aggregate lumber contents of the logs, ascertained by adding together the separate contents of each log as noted on the tally board. The mere facts that a temporary entry is made on a slate, or by chalk scores, or in this case, by pencil memoranda on tally boards, for the purpose of convenience and aiding the memory until a book entry could be made at the close of the day, would not operate to deprive such subsequent entry of the character of an original entry, nor the book in which it was made of its character as an original book of accounts.

Whitney v. Sawyer, 11 Gray 242; Faxon v. Hollis, 13 Mass. 427; Smith v. Sanford, 12 Pick. 139. The original memoranda are not books of original entry, and need not be produced; and the fact that such memoranda had been made to aid the memory until a formal entry could be made will not make the book into which they were at once transcribed secondary evidence.

Whart. Ev., Sec. 632. The difficulty in this case lies in the fact that the books entries were made from the tally board memoranda by a person other than the one who made the tally board entries, and who knew nothing of the correctness of the data transcribed.

* * * Now, if Mr. McFadden had made these entries from his own personal knowledge, the book might have been competent evidence for the plaintiff, upon evidence of that fact and of the further fact that he was 'dead or insane' or beyond the reach of the process or commission of the Court'. In this case McFadden knew nothing of the correctness of the facts which he recorded.

* * * Their negligence should not operate to place their adversaries under all the disadvantages consequent upon being subjected to the effect of hearsay evidence."

See:

Feuchtwanger v. Manitowoo Malting Co., 187 Fed. 173;

Bates v. Preble, 151 U. S. 149;

Callihan v. Washington Water Power Co., 56 L. R. A. 772; 27 Wash. 154; 67 Pac. 697;

Watrous v. Cunningham, 71 Cal. 32;

Landis v. Turner, 14 Cal. 573-576;

Countryman v. Bunker, 101 Mich. 218; 59 N. W. 422;
Kerns v. McKean, 65 Cal. 411;
Mayor & City v. Second Avenue R. Co., 7 N. E. 905;
Matko v. Daiy, 85 Pac. 721;
Halloway v. White-Dunham Shoe Co., 151 Fed. 217;
Chicago Co. v. Hewitt, 64 Fed. 314-316;
Ford v. Cunningham, 87 Cal. 210;
White v. Whitney, 82 Cal. 166;
Carroll v. Storck, 57 Cal. 366;
Tully v. Stevens, 50 Pac. 595;
Trabor v. Hicks, 32 S. W. 1145-47;
Glenn v. Liggett, 47 Fed. 472-475-479;
Lum v. Howells, 74 Pac. 432;
Bailey v. Kreutzman, 141 Cal. 519;
16 Cyc. 1214 and cases cited;
Chaffee v. U. S., 85 U. S. 516.

We respectfully submit that the refusal of the Court to permit a detailed examination as to each item was virtually denying to Pabst Company the right to have in cross-examination what should have been required of Horst Company on direct examination.

The entries so far as they were connected with Pabst 2000 bales were not made in the books by anyone and the data used to draw inferences on which the alleged connection with the Pabst 2000 bales was not made by the parties testifying con-

cerning them and the conclusions drawn therefrom were not made at or near the time of the transaction and were not compilations from books which were in evidence.

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THE RULING OF THE COURT CANNOT BE UPHELD BY THE RULE THAT WHERE BOOKS ARE IN EVIDENCE THAT COMPILATIONS CAN BE MADE THEREFROM BY ANYBODY WHO IS A COMPETENT ACCOUNTANT.

In all such cases some witness familiar with the facts had testified that the books were correct entries of the facts made within a reasonable time after the facts occurred.

No such testimony is here introduced.

The managers of the Chicago office and the New York office were available for Horst Company but not produced.

The bookkeeper was not produced, but a very clever witness, calling himself special assistant, acted as bookkeeper's assistant, and testified to the application of expenses to Pabst Company's goods which only existed theoretically as Pabst goods.

We respectfully submit that the entire case was dependent upon the proof of the various items claimed by Horst Company to be basis of damage to show the extent to which the Horst Company suffered by reason of Pabst Company's alleged default and that, in view of the fact that some of the items had already been proven to be incompetent and immaterial, for instance the expense item

of $13.50 for the stenographer's Christmas present, $500 a month salary in June when but 16 bales of Pabst hops were unsold, and the like, and the testimony of the witness that he did not know what various trips like the trip to Montreal where no Pabst goods were sold was for, warranted a most liberal cross-examination and that justice could not be had without it.

Pabst Company's attorneys made an effort upon cross-examination to get at the exact facts from the books, but from the extracts of testimony herein quoted, it will be apparent to the Court that it was a practical impossibility.

*It was not incumbent upon Pabst Company to make Horst Company's incompetent evidence competent but was Horst Company's duty in the first instance to bear the burden of proving by competent and material evidence the damage he claims to have sustained.*

Horst's bookkeeping assistant admitted that the entries could not be checked by another expert.

The method of trying the case not only denied Pabst Company the right to cross-examine the witnesses who were familiar with the facts—but also even denied them an opportunity to examine the books containing the tabulations made therefrom by the special assistant as shown by the following testimony of Mr. Lange:

> "Mr. Powers. *Would it be possible for Mr. Farrell to take this book and check them over?*
> A. *No, sir, it would not.*

Q. *Now about with regard to the 404 bales in New York?*

A. *The same thing holds good as to New York.*

Q. *So you do not know at the present time how many bales were in New York on November 4, 1912?*

A. *Yes, I do.*

Q. *Show me how you know.*

A. *I could not show you from this book. I have not all of the records here.*

Mr. POWERS. I move to strike out the testimony with reference to Chicago and New York goods unless some entry is shown where they are contained in the books.

The COURT. That is not the proper way to reach it. I will deny

official, as in records kept by municipal officers or by private associations, the reports of public boards, bodies, or officials; or of officers of private corporations; or mercantile, as an account of sales, or a receipt, or books of account; or the more fugitive form of letters, memoranda, or telegrams. In other words the rule of exclusion applies generally to all forms of written hearsay."

In the case of Chaffee v. United States, 85 U. S. 516, the Supreme Court said:

"The collector at Dayton testified as to the sources of information from which he made up the certificates and it was admitted that the collectors at the other points would testify substantially to the same effect as to the sources of the information on which they acted. These were generally the freight bills presented by captains of boats, as required by the act of 1840; but sometimes the bills were not presented, and then the simple statements of the captains were received, if they were well

known. The collectors had no personal knowledge of the truth of the statements contained in the certificates. * * * When the books were offered, objection was taken to their introduction, on the general ground that they were hearsay evidence and transactions between third parties. Subsequently a similar objection was taken to each of the certificates on a motion to exclude them from the jury.

The books were not public records; they stood on the same footing with the books of the trader or merchants. The fact that the lease was from the State did not change that character of the entries made by the collectors, who were simply agents of the lessees, and not public officers of the State. Their admissibility must, therefore, be determined by the rule which governs the admissibility of entries made by private parties in the ordinary course of their business.

And that rule, with some exceptions not including the present case, requires, for the admissibility of the entries, *not merely that they shall be contemporaneous with the facts to which they relate, but shall be made by parties having personal knowledge of the facts, and be corroborated by their testimony,* if living and accessible, or by proof of their handwriting, if dead, or insane, or beyond the reach of the process or commission of the Court. The testimony of living witnesses personally cognizant of the facts of which they speak given under the sanction of an oath in open Court, where they may be subjected to cross-examination, affords the greatest security for truth."

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THE OVERHEAD WAS IMPROPERLY APPORTIONED.

To allow the testimony of Lange that he apportioned the entire expenses of the Chicago and New York offices from November 4, 1912, to July 1, 1913,

on the basis of 1346 bales to Pabst and 2536 bales to Horst, merely because Horst had 1346 bales of Cosumnes hops on hand in warehouses in Milwaukee, Chicago and New York, to sell at that time, was error, because,

1st. It permitted the witness to determine the question of law as to what was a proper basis of apportioning the expenses.

2nd. The witness did not know the connection the several expenditures had to the bales to which he apportioned the cost.

3rd. The connection of these expenses with the finishing up of business on hand on November—with business anticipated after July and with general obligations of Horst Company was not in evidence and not considered.

4th. On November 4th, the San Francisco office had on hand 10,500 bales (p. 235), including these 3882 bales and it was for the jury to determine whether the Chicago and New York overhead was used partly for sale of remaining 6618 bales. Moreover the proper apportionment was a mixed question of law and fact which should have been left for decision to the jury under proper instructions.

Horst and Lange testified that the list of sales was compiled from a series of reports which had been sent to him from the Chicago and New York offices.

Moreover, the testimony is that 2764 bales had been sold up to November 4th, 1912 (p. 365), and the principal part of the balance were sold in November, December and January, and practically all were sold by the end of February. It was unfair to apportion any of the expenses during March, April, May and June to Pabst Company.

Of the Pabst hops only 36 bales remained in hand May 1st, in other words, 7200 pounds remained on hand May 1st. If these were only worth twelve cents (as testified to by Horst) they were worth $864.00.

It was for the jury to decide whether the expenses of the two offices, one in New York and one in Chicago was a reasonable overhead expense during the said month of May to sell only 16 bales of hops. Surely salaries of $500, $350 and $175 a month and rent of a New York office in the sum of $100 would not ordinarily be considered a reasonable expense for selling $864.00 worth of goods and would not be an evidence that the bailee was incurring these expenses as an ordinarily careful man would in selling such goods.

There were only 16 bales unsold on June 1, 1913.

Again all these entries as charges against Pabst were self-serving declarations and were made after Horst had determined that it was necessary for him to prepare for this law suit.

As the entries so far as they were connected with the Pabst 2000 bales were not made in the books

by the parties testifying concerning them at or near the time of the transactions by the witness making the computation, they were hearsay and inadmissible.

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THE REFUSAL TO ALLOW THE PRICES PAID FOR THE 1062 BALES OUT OF THE 3062 BALES ON HAND ON NOVEMBER 4, 1912, WHICH WERE USED TO FILL CONTRACTS MADE PRIOR TO NOVEMBER 4, 1912, WAS ERROR.

It was for the jury to decide what was the price obtained for the so-called 2000 bales of Pabst hops.

The Horst Company did not set aside any 2000 bales.

There were two facts to be decided before the correct sale price of any 2000 bales chargeable to Pabst could be determined, viz.:

First, whether the 3062 bales were of quality like samples 21 to 24, and

Second, if they were the proper 2000 bales to be applied to this contract.

To permit the Horst Company to arbitrarily take those particular 2000 bales out of the 3062 bales on hand which subsequently sold for the lowest price and apportion all charges to them removed the right of the jury to determine this. Moreover the sales book proved conclusively that Horst did not have on hand 2000 bales of these Cosumnes hops on November 4, 1912.

The uncontradicted evidence is that the sales book showed that 2764 bales of Cosumnes hops had been sold by Horst prior to November 4th. The total number baled including clean ups was 4150 bales or 4000 bales without clean ups. Hence there were only 1236 bales available for delivery to Pabst on November 4th, and it should have been left to the jury to decide whether any of these were included in the 2000 bales chargeable to Pabst and how many thereof was proper to be used in computing overhead to be charged to Pabst during the sale months and at what price.

Again the testimony shows that there were but 36 bales "Pabst" hops on hand May 1st, and 12 bales "Pabst" hops on hand June 1st, and the jury should have had the right to decide whether or not these bales could not have been used in filling the orders instead of the 1062 bales actually used.

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### AS TO CHARGING BAD ACCOUNTS TO THE OVERHEAD EXPENSE.

If Horst Company's theory be correct the 2000 bales which Pabst should have taken on November 4, 1912, were held by them as bailees for the Pabst people. Their theory was that they were acting under Section 3094 of the Civil Code:

> "That one who sells personal property has a special lien thereon dependent upon possession for its price if it is in his possession when

> the price becomes payable and may enforce his lien in like manner as if the property was pledged to him for the price."

We respectfully submit that no pledgee has the right to require the purchaser of the goods to insure him against his own mistakes in selling property for a credit instead of for cash.

Moreover there was a market at Sacramento and the goods should have been sold at Sacramento.

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AS TO THE MARKET BEING SACRAMENTO.

The proper place for Horst Company to have sold the 2000 bales was at Sacramento. He testified that there was no market in Sacramento but all of the other experts testified that there was a market at Sacramento. One man Koch testified that he was seeking to purchase one thousand bales of Cosumnes hops from 17 to 17½ cents a pound in November, 1912. Another man, Sweeney, said he actually paid 18¾ cents a pound for 1500 bales of Cosumnes hops in November, 1912. Another man, Drescher, said that he was selling Cosumnes hops in November, 1912, from 17 to 19 cents and that the market would take 2000 bales in six weeks, and at 16 cents would take them inside of a week.

In an almost identical case the Court of Appeals of the Second District of California held that where there was no evidence as to a market nearest to the place where the oranges were sold nor of the market

where they were sold that a finding as to the effect of the resale was not sustained by the evidence, the Court said:

> "It is further found that this is the best price which plaintiff could have obtained therefor in the market nearest to the place at which it should have been accepted by the defendant, and at such time after the refusal of the defendant to perform said contract as would have sufficed with reasonable diligence for the plaintiff to effect a resale. But from the evidence it appears, without substantial contradiction, that the market price of oranges at Porterville during the periods referred to was much higher, and there was no evidence as to the value of the fruit in any other market; nor was there any evidence or finding as to the market nearest Porterville, or as to where, or when the oranges were sold. It is clear, therefore, that this portion of the finding, is not sustained by the evidence and that it must be disregarded."

Willson v. Gregory, 84 Pac. Rep. 356-357;

Tustin Fruit Assn. v. Earl Fruit Co., 53 Pac. Rep. 697.

Moreover the value of the hops in question was the value in November, 1912, in the Sacramento market.

Tustin Fruit Assn. v. Earl Fruit Co., 53 Pac. Rep. 697;

Hill v. McKay, 94 Cal. 5;

Rayfield v. Van Meter, 52 Pac. Rep. 666.

There is no evidence of any attempt to sell any of these hops in the Sacramento market. As a matter of fact on November 4, 1912, 400 of the bales

were at Milwaukee, 440 of the bales were in New York, 639 of the bales were in Chicago and 345 of the bales en route east (p. 342).

It is very evident that there was no attempt to sell the hops in the Sacramento market and there was no attempt to prove the market value in the Eastern market where the hops were sold and that therefore the whole scheme of proving damages by means of sales carried on through Eastern markets was absolutely improper.

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**AS TO ERROR BECAUSE OF PERMITTING TESTIMONY WITH REFERENCE TO CUSTOM TO DELIVER AT ANY TIME PRIOR TO THE END OF THE SEASON.**

Horst in order to be able to get the advantage of the lesser price for goods in the end of February, 1912, attempted to prove a custom by his testimony that there was a custom to allow the seller the option to deliver hops at any time before the following March.

No other man in the hop business knew of the custom.

Horst, himself, when he offered a contract to Pabst inserted deliveries September to December (p. 111).

Drescher who had been in the business for forty years as a hop grower and dealer in the Cosumnes District in Sacramento, testified:

> "There is no custom of that kind to my knowledge. Unless stated to the contrary such deliveries are usually made as soon as the product is available" (p. 94).

Moreover that is the law on the subject.

We respectfully submit that a custom is an unwritten law established by long usage and it must be so certain that the proof leaves the custom definite. It must also be reasonable and must be continued without any interruption.

Am. & Eng. Enc., Vol. 29, page 367.

It is not enough that it be the usage or custom of one of the parties to the contract, or of some persons engaged in the trade, but it must be the general usage or custom of those engaged in the trade at the place where the contract was made, or was to be performed; it must be so general that those who are engaged in the trade are to be presumed to know of its existence.

Minnis v. Nelson, 43 Fed. Rep. 779.

The adopting of a peculiar mode of doing business by even two-thirds merely of those engaged in doing this particular business has been held not sufficient to make that mode a custom, it appearing that the usage was limited.

Bryant v. Brown, 53 Atl. Rep. 56.

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**AS TO ERROR BECAUSE OF REJECTION OF TESTIMONY OF WITNESSES WHO TESTIFIED AS TO THE IMPROPER MANNER OF PICKING HOPS BY HORST COMPANY.**

We respectfully submit that the testimony of witnesses Chalmers and Traganza was not only competent, relevant and material but was addressed to one of the absolutely material points of the case.

The cleanliness of the pick of Horst Cosumnes Ranches in 1912 was an important factor in determining whether or not the hops were choice.

(a) Samples 1 to 20 represented the entire hop output of the Cosumnes ranch and were fair representatives of the bales from that ranch, part of which bales were involved in the contract at one time (150 to 175 bales of so-called pick ups were not included but were of the same general nature except that the hops were lacerated in the process of picking).

(b) Experts on both sides differed as to whether or not samples 1 to 20 evidenced cleanly picked hops.

(c) The jury was entitled to consider and weigh the testimony of the experts on each side.

(d) The testimony of Chalmers and Traganza to the effect that they saw stems and leaves being run into the hops (from which hops when baled the samples were taken) tended to corroborate the expert opinion of the defendant's experts that the samples did not show cleanly picked hops and was therefore admissible.

(e) This evidence was admissible as rebutting the testimony of Mr. Horst and his witnesses which in general was to the effect that the hops were very cleanly picked that year and that all bales were picked alike.

During the taking of the testimony the Court ruled as follows (p. 466):

> "Now, Mr. Powers, if this witness will testify that he knows that they were the hops that are now in controversy here, the identical hops, I will let him testify. You have got to prove that they are the identical hops, otherwise it is wholly immaterial."

It was manifestly impossible to provide such testimony by the one witness then on the stand. But the record already showed that with the exception of 150 bales of pickings all the remaining Horst bales were identical in character and that samples 1 to 20 were taken from these bales and this witness was testifying as to the physical conditions under which these bales from which samples 1 to 20 were taken were baled.

It is submitted that it was sufficient and the best evidence obtainable to show that the witnesses saw leaves and stems being run into the general lot from which the bales were made up because out of these hops in said bales samples 1 to 20 were taken and forwarded by plaintiff to defendant.

Moreover testimony is relevant even though its connection with the hops in question could only be proven by other evidence than that given by this one witness.

Abundant connection had already been introduced.

Moreover Horst testified (p. 366) that he was ready, able and willing to deliver to defendant 2000

bales equal to samples 21, 22, 23 and 24 out of the 3062 bales left in his hands on November 4, 1912, which latter were a part of the 4000 bales of hops which were being picked and baled at the time these witnesses were visiting Horst's hop house.

Certainly any evidence that Horst Company was fraudulently attempting to prepare these bales in such a way as to make them weigh more than usual by permitting stems and twigs to go in the hops while being picked was admissible, especially when Horst Company had a contract which they thought they would force Pabst to take.

It must be remembered that the Horst Company's theory is that it could require Pabst Company to accept "air-dried" hops.

The Horst Company were the only persons who manufactured "air-dried" hops and that manufacture took place in the hop house where Chalmers and Traganza saw the picking and drying operation.

Moreover the theory of the Horst people was that choice hops meant a hop of the best average quality for any particular year (p. 208).

Consequently the Horst Company considered that they had Pabst Company bound to a contract to take the best average of any crop that they should produce during the year 1912 on the Cosumnes ranches.

Witnesses Chalmers and Traganza were testifying as to the manner in which these hops were being picked and dried.

Horst testified that the entire 4000 bales were of the same degree of choiceness:

> "One bale was substantially as good as another" (p. 105).

And he also testified (p. 106) to the question:

> "You say uniform in quality? Yes, a crop may be uniform in quality. Simply the skill in picking and drying them makes uniformity in quality."

The testimony of these witnesses was in rebuttal to the questions asked Mr. Horst.

The samples were merely representatives of the grade of hops to be supplied. The question whether or not samples 1 to 20 evidenced hops that were cleanly picked was a question for the jury to determine. The main question here was whether or not the samples in suit alleged to *accurately represent the bales to be delivered* contained so excessive an amount of leaves and stems as to warrant the claim that they did not represent choice hops because not cleanly picked.

The Supreme Court of California in the case of San Pedro Lumber Company v. Reynolds, 53 Pac. 410-415 says:

> "The effect of the evidence establishing fraud in specific instances is thus declared by Wharton in his work on Evidence (p. 39): 'We may, in fine, conclude generally that, when a

mass of action is examined in block, it is allowable to assume, as a presumption of fact, that if a part of it is tainted in a particular way, the rest is so tainted. Thus, where most of the vouchers produced by a party in proving his accounts show an overcharging of items, it may be inferred, as a presumption of fact, that a like proportion of the items not vouched are overcharged.' "

In People v. Walden, 51 Cal. 588, the Court said:

"Presumptions of fact embrace: 'All the connections and relations between the facts proved and the hypotheses stated and defended, whether they are mechanical and physical or of a purely moral nature. It is the class of presumptions which prevails in the ordinary affairs of like, namely, the process of certaining one fact from the existence of another without the aid of any rule of law, and therefore it fails within the exclusive province of the jury.' "

In Lyon v. Hancock, 35 Cal. 372, the Court said:

"Suppose, upon coming to the street, the defendant had found two women, instead of one, of equal respectability and character, one of whom must have cast the brickbat, one the wife of his friend, the other of his enemy, would not the friendship of the one and the enmity of the other constitute probabilities to be taken into account in determining which perpetrated the act? Other probabilities being equal, as we have supposed, no one would hesitate to say that the act had been committed by the wife of the defendant's enemy, and not by the wife of his friend."

17 Cyc., 820;

1 Moore on Facts, Sec. 516;

1 Moore on Facts, Sec. 548a;

Schmitt v. Trowbridge, 21 Fed. Cases 12,468;
Commonwealth v. Kendrick, 18 N. E. 230;
Liverpool & L. & G. Ins. v. Southern Pacific Co., 125 Cal. 434; 58 Pac. 55;
1 Wigmore on Evidence, Sec. 441;
Commonwealth v. Goodman, 97 Mass. 117;
Central Vermont R. Co. v. Soper, 59 Fed. 879-890;
Grand Trunk R. R. Co. v. Richardson, 91 U. S. 454;
Barreda v. Silsbee, 62 U. S. 146;
1 Greenleaf on Evidence, Secs. 112-113;
Luman v. Golden Ancient C. Mining Co., 74 Pac. 307, 311; 140 Cal. 700;
Jones on Evidence, Sec. 357;
Burley v. German American Bank, 111 U. S. 221;
Garfield v. Knights Ferry Water Co., 14 Cal. 35;
Birch v. Hale, 99 Cal. 299 (33 Pac. 1088);
Fey v. Society, 120 Wis. 358;
Lowe v. Hart, 90 N. Y. 457-461;
San Pedro Lumber Co. v. Reynolds, 121 Cal. 74; 53 Pac. 410-415;
Faucett v. Nicholls, 64 N. Y. 377;
1 Wharton on Evidence, Sec. 43;
People v. Walden, 51 Cal. 58;
Lyon v. Hancock, 35 Cal. 372.

When a material fact is not proved by direct testimony it may be rationally inferred by the

Court or jury from the facts which have been so proved, even though the inference be not a necessary one.

17 Cyc., 820.

Juries must often reason according to probabilities, drawing an inference that the main fact in issue existed, from collateral facts not directly proving, but strongly tending to prove, its existence. The vital question in such cases is the cogency of the proof afforded by the secondary facts.

1 Moore on Facts, Sec. 516.

It was not necessary for Mr. Chalmers or Mr. Traganza to follow the leaves and stems which they saw being rushed into the kiln to see whether or not they went into the two thousand bales designed for Pabst. From the very nature of it, it was impossible and yet we assert with confidence that the mere fact that plaintiff's employees for two hours were seen to be running leaves and stems into the hops which were subsequently baled and from which bales the samples were taken on which offer of delivery was made, should carry with it some degree of presumption that such extraneous matter found its way into some of the bales of hops and presumably into all of them as all were declared to be equally choice. It was a transaction which might fairly be held by the jury to characterize the entire proceedings while Horst Company were picking, drying and bailing their Cosumnes hops, and if the jury believed it

did in whole or in part characterize the whole proceedings they might have believed from the facts sought to be proved that it so strongly tended to corroborate defendant's witnesses that the crop was not cleanly picked as to have been determinative of the action.

In an action to recover back an alleged excess of internal revenue taxes paid on matches, the extent to which, if any, the plaintiffs overran the number of matches for which revenue stamps were affixed was in dispute, Judge Brown charged the jury as follows:

> "It is impossible for the government to count the matches in those boxes; but where we find one or two or a few boxes in a case overrunning, it is a fair presumption that all the boxes in the case overran; and, where you find boxes in one case overrunning, it is fair to be presumed that all the boxes in that class overrun; but it would not follow that if other matches were made of a different class, or if they were boxed differently, as if the boxes were differently shaped or of different sizes, they would all overrun; but here there were one hundred thousand boxes of a certain size, the matches being all of a size, and of a certain quality of timber. And you find, in that number of boxes, that twenty of fifty boxes, indifferently chosen, overran, and none of them underran. It would be a fair presumption that the entire one hundred thousand would overrun."

1 Moore on Facts, Sec. 548a;

Schmitt v. Trowbridge, 21 Fed. Cases No. 12,468;

Commonwealth v. Kendrick, 18 N. E. 230.

In the case of Liverpool & L. & G. Ins. Co. v. Southern Pacific Co., 58 Pac. (Cal.) 55, which was an action brought against the Southern Pacific Company on a claim that certain building had been negligently set afire by reason of one of the Southern Pacific Company's engines the Supreme Court of California said in respect of admission of certain facts:

> "The evidence as to the cause and origin of the fire was circumstantial. As a part of the instruction, the Court said: 'If, upon the whole evidence, and taking into consideration all the conditions and circumstances surrounding the fire, you find it to be more probable that the fire was caused by sparks escaping from the swing engine than from any other cause, your finding upon that point, to wit, the origin of the fire, should be accordingly.' This portion of the instruction is especially criticized as a declaration to the jury that they might reach a determination upon an important fact from mere conjecture, guess, or supposition, without any evidence in support of it; that they were told that they could reach a verdict upon the doctrine of probabilities; and it is said that a case is not proven by a preponderance of evidence when a mere probability is established. We think, under the facts and circumstances of this case, that this criticism is also without merit. The question of the origin of the fire was one to be determined by circumstantial evidence. No one saw a spark from the engine alight upon and set fire to the roof of the ice house. It was, then, under peculiar circumstances of this case, a proposition for the plaintiff to establish that the probability was that the engine occasioned the fire. Nor does the use of the word 'Probability' in the instruction of the

Court, carry the question into the domain of mere conjecture and surmise. In civil cases which are decided in favor of the litigant upon a mere preponderance of evidence, the rule of decision is, after all, but a rule of probability, and this is well recognized. Says Greenleaf: 'In civil cases * * * it is not necessary that the minds of the jurors be freed from all doubt. It is their duty to decide in favor of the party on whose side the weight of evidence preponderates, and according to the reasonable probability of truth.' And again 'A presumption of fact is an inference which a reasonable man would draw from certain facts which have been proved to him. Its basis is in logic; its source is probability'. 'Circumstantial evidence is of two kinds, namely, certain * * * and uncertain, or that from which the conclusion does not necessarily follow, but is probable only, and is obtained by process of reasoning'. L. Greenleaf Ev. (15th Ed.), pp. 23, 24, 72. Says this Court, in Butcher v. Railroad Co., 67 Cal. 518, 8 Pac. 174: 'Evidence that sparks and burning coals were frequently dropped by engines passing upon the same road upon previous occasions has been held to be relevant and competent to show negligence, and to make it probable that the plaintiff's injury proceeded from the same quarter.' And further reference may be had to Sheldon v. Railroad Co., 14 N. Y. 218; Kelsey v. Railway Co., (S. D.) 45 N. W. 204; Yanktown Fire Ins. Co. v. Fremont, E. & M. V. R. Co., (S. D.) 64 N. W. 154; Longabaugh v. Railroad Co., 9 Nev. 271."

In Grand Trunk Railroad Co. v. Richardson, 91 U. S. 454, the Court said:

"If it had appeared that some of these engines did scatter fire then the fact of the pas-

sage of the two engines would have established such a possibility and probability. The plaintiffs met any possible claim, that none of the defendant's engines used in the vicinity could scatter fire, by showing affirmatively that some of them did. The plaintiffs thereby established the possibility, and consequent probability, that the damage resulted from the negligent act of the defendant; and clearly fastened upon it the burden of showing that the particular engines which crossed the bridge before the fire were both so constructed, regulated and operated as to prevent the scattering of fire. Proof that other engines have thrown fire as far as the building destroyed, offered in a case where the building is separated from the track, stands upon precisely the same footing as proof that other engines have 'Scattered fire, offered in a case where a railway bridge itself is first burned. The question in each case is, whether the fire can be thrown far enough to occasion the damage. It is thrown far enough when 'scattered' in one case, as clearly as when thrown to the distant building destroyed, in the other."

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AS TO ERROR IN REFUSING EVIDENCE THAT HOPS WERE TOO GREEN WHEN PICKED BY HORST COMPANY.

Mr. Horst proved the picking started August 12th, and ended September 7th. Chalmers testified that he was familiar with the hops in that district August 12th, the same year and at that time the crop was too green to pick and was too green until from the 20th to 25th of August, the same year.

Two contracts were introduced showing agreements of Horst Company to delivery of early hops.

Horst, himself testified that breweries were "having hard skidding" for hops because of the shortage in 1911, in which year hops went to the extraordinary price of 40 cents.

A demand therefore was created for consumption in 1912.

Early deliveries in 1912 were desirable.

Hence over-zealousness in delivery might easily mean picking of immature berries.

Hop berries have color and qualities when green that are not capable of being recognized in the dried samples by one who does not know what the difference in appearance is of a hop which has been picked when immature from one that has been picked when fully ripe.

It was obviously an expert question, whether or not the samples in suit were representatives of choice hops. One of the chief factors in determining whether or not hops are choice is maturity of the hop when picked.

If immaturely picked they were not choice.

Plaintiff proposed to deliver to Pabst two thousand bales of hops of which these samples were representative.

Experts differed as to whether or not the samples represented properly matured hops. This was obviously a question for the jury and the testimony of Chalmers in respect thereof is of vital importance

to the Horst Company and its rejection prejudicial error.

Testimony of experts as to the condition of the berry with reference to immaturity due to greenness of picking was addressed to a fact known only to experts, that is to say: persons having experience in the color of hop berries when ripe.

Chalmers had been in the hop business in the Cosumnes district for over thirty years and knew the Horst ranch and visited it during the picking season of 1912.

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**CHALMERS' TESTIMONY WITH REFERENCE TO THE GREENNESS OF THE HOPS WAS FIRST INTRODUCED WITHOUT ANY OBJECTION ON THE PART OF HORST COMPANY'S COUNSEL.**

The record shows at page 303 that the question was asked witness Chalmers as follows:

> "Q. What was the condition of the hops in the Cosumnes district with reference to ripeness on or about August 12th, 1912?
>
> A. They were green, too green to pick. They ripened from about the 20th to the 25th of August. There were no hops ready to pick before that."

We respectfully submit that this testimony was eminently proper and was addressed to an issue in the case. Witness Horst had testified (p. 105) with reference to the hops that 4500 bales of hops picked at the ranch in question

> "with the exception of 150 bales, all the rest of the bales are of equal grade. One bale was substantially as good as the other" * * * "We

> used a machine. We started in picking the ripest first and by the time we got them picked, the hops were no riper at the end than the hops we started to pick at the beginning. * * * The conditions being the same on our land as the conditions on other people's land our hops ripen substantially as other people's ripen."

Again at page 115:

> "The grading of hops is like the grading of other commodities, such as wheat, and things of that kind and with hops the *picking, packing and curing* has a great deal to do with them."

Again at page 123 Horst testified:

> "The soundness of hops is produced by drying and curing. The factors which go to make up the value of a hop are the district in which it is grown, *the time* of picking, the proper picking as to the season, and the fatness and fullness of the hop."

We submit therefore that no objection was introduced as to the evidence while the witness was on the stand nor until after counsel for Pabst Company began to make his argument.

While the counsel was arguing the case he was interrupted by the attorney for the Horst Company so that the testimony with reference to the greenness of the hops was stricken out. Counsel for Pabst Company called the attention of the Court to the fact that the judge was mistaken and said that only so much of Chalmers' testimony as referred to picking had been stricken out and then the Court ruled it was irrelevant.

We respectfully submit that the evidence was material and proper and that it would have been error to refuse to allow the testimony and that it was a flagrant error to strike out the evidence when the case was closed and during the argument of the case.

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AS TO ERROR IN ALLOWING GROWERS TO TESTIFY AS EXPERTS WHEN THEY KNEW NOTHING OF THE MARKET.

Several growers, neighbors of Horst, in the Cosumnes district had been shown various samples of hops made up in a peculiar way and they were caused to sign a written statement that they were competent to judge of the quality of Cosumnes river hops and that they considered certain hops equal to or better than choice Cosumnes hops of the year 1912. Mr. Chalmers testified that he refused to sign his as choice Cosumnes hops but nevertheless they produced a written statement to that effect. Mr. Mahon testified:

> "I signed it with the understanding that the word 'choice' was to be erased. I did not consider the hops choice to my opinion."

Nevertheless Horst Company introduced Paul E. Peterson and about 10 or 15 other growers who had signed such statements and had them testify. It will be remembered that Mr. Horst testified that he had had a great deal of litigation and that "I prepared for the lawsuit before we picked the crop" (p. 135) and as preparation for the trial he got the neighbors to sign their names to papers, stating that they had

examined some of his samples thinking they were helping make a market for Cosumnes hops. Chalmers testified that his signature was obtained without him reading the paper and when Horst's employees

> "said they were going to get a better price for Cosumnes hops and I signed that, but not as choice hops. I would not have signed anything in the world like that if I had stopped to read the paper over" (p. 307).

Mahon testified:

> "They said they wanted me to sign the statement to work up a trade with the brewers for Cosumnes River hops" (p. 291).

With these neighbors "thus prepared" they put them on the witness stand as "experts" and had them testify as to the quality of the hops.

After Peterson and one or two others testified it was stipulated that the other growers if called as witnesses would testify

> "to certain facts concerning the experience and capacity of experts that the witnesses would be deemed to have testified in the same manner as the other growers, and that defendant should be deemed to have the same exceptions and objections, and that the witnesses would be deemed to have the same experience and qualifications as the experts and no more than the grower witnesses who have already testified and that the defendant would have the same objections and exceptions to their testimony as not being expert" (p. 141).

Peterson's testimony (p. 124) was that he had been in hop business twenty-five years; that he was familiar with the supervision and care-taking of

hops; that he first grew them in 1912 and did not see the 1911 crop. "I have sold hops. Generally sell my hops as choice hops." And then over the objection of counsel for Pabst Company he testified as to the quality of the hops and as to the character of the hops and their picking.

On cross-examination he testified:

> "I do not pretend to be a hop expert. My knowledge has been gained by selling and raising them for 25 years. I have never bought hops for market. My experience has been gained by getting them ready for the market" (p. 128).

We respectfully submit that the question here as to the choiceness of hops was what brewers and hop dealers considered choice hops, and not what growers considered choice. Hop experts in this case must be those familiar with the uses and requirements of the trade concerning dealings of brewers such as Pabst with dealers such as Horst Company.

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### IN RE EXPERT EVIDENCE OF FARMERS.

Wigmore on evidence quotes with approval the definition of an expert given by Justice Foster in Ellinwood v. Bragg, 52 N. H. 489, as follows:

> "The subject must be one peculiar and exceptional, concerning which some explanation, such as peculiar knowledge alone can afford, is required in order to render it intelligible to the comprehension had understanding of an ordinary man."
>
> Wigmore on Evidence, Sec. 1923.

In this particular instance the peculiar knowledge was that of men who knew the value of hops to brewers purchasing the same from hop dealers in the Cosumnes district near Sacramento and the qualities of such hops as would be described by hop experts as "choice".

Experts in this instance were necessarily those who knew the usual tendencies of growers willing to sell and of brewers willing to buy where the qualification of choiceness was under discussion.

Witness Peterson's only knowledge of what happened between brewers and hop merchants was the same as that of the jurors themselves.

The mere fact that Peterson had himself sold his own crop of Cosumnes hops to a dealer did not make him an expert whose opinion as to what that dealer could do with those hops when offered to a brewer, the ultimate user, had any value to the jury.

Peterson specifically disclaimed being a hop expert. He did not claim to ever have examined any hops except his own. He did not claim ever to have been party to any sale of any hops but his own. He did not claim to know what was the usual motive in moving the brewer to buy or the hop merchant in selling either as to price or as to evidence of choiceness.

Wigmore says concerning qualifications of an expert as to handwriting, Sec. 2012:

> "But the opinion rule declares it useless to listen to the views of an ordinary or lay witness when based merely on the inspection of speci-

> mens which the Jury having them in hand can judge as well as he; hence an expert under the opinion rule, signifies one who by a study of or experience with writings is able to afford the tribunal special assistance."

So with a hop expert. It is necessarily a man who had a special experience in the buying and selling of hops, and examined samples which were accustomed to be accepted by brewers purchasing from dealers and being offered by dealers to brewers as choice.

What a farmer, like Peterson, dealing with one crop of hops thought, was wholly inadmissible.

The California Court has said:

> "During the progress of a trial, it became important to determine whether or not two certain pieces of cloth were of the same texture and quality. Expert evidence was introduced upon this question, and we think properly introduced. It was a matter upon which the ordinary juror, if left to his own knowledge, would be very unlikely to form a correct judgment. Persons experienced in dealing in and handling such cloths would be more competent to pass upon the issue presented. It was a matter not coming within the common knowledge and common experience of men, and for that reason witnesses with special knowledge might well be called upon to give the jurors the benefit of that knowledge and experience in the form of expert evidence."
>
> People v. Lovren, 119 Cal. 88, 91.

The knowledge and experience there was as to the similarity of the texture and quality of certain cloth.

The knowledge and experience required in the case at bar was as to whether or not the quality of certain hops evidenced by samples was such as was accepted by merchants selling to brewers and brewers buying from merchants as choice and to the price of choice goods where brewers were willing to buy and dealers willing to sell within a reasonable time after November 4, 1912. This was not information of a kind that a hop grower selling his own crop without knowing anything about the customs and habits of hop dealers and brewers was qualified to testify to.

Wigmore on Evidence, Sec. 717, says:

> "Value is, of course, the rate at which an exchange would in fact be made at this moment by the purchasing and selling community. Hence a knowledge of what an article ought to exchange for is not a knowledge of value, at least in the sense in which the Courts regard it. Nor is a knowledge of the various qualities and uses of an article sufficient if it stops short of including the exchangeable rate which these qualities actually make it. In short where there is a market value, the knowledge of the witness must be of this market value."

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### AS TO ERROR IN ALLOWING TESTIMONY OF HORST IN REBUTTAL.

Samples 21 to 24 were sent as type samples. The Horst Company claimed that samples 25 to 38 tendered by them to Pabst Company were represented as equal to type samples 21 to 24. They did

not attempt to offer samples 1 to 20 as equal to samples 21 to 24. They never tendered Pabst Company samples 1 to 20 as deliveries equal to samples 21 to 24.

Consequently it was error for the Court to permit Horst to be recalled in rebuttal to testify that 3042 bales which he had on hand from which samples 1 to 20 were drawn, were equal to samples 21 to 24 and capable of delivery thereon.

Pabst Company's counsel had already attempted to cross-examine Horst on this subject and Horst Company had objected to the question.

Not only was it error for the Court to open up this case after the evidence was all in to allow Horst Company to open up a new element which was a part of their main case, but under the circumstances it was error of a kind which worked in a very detrimental way to the Pabst Company because it prevented them from properly preparing a defense to this line because they had a right to rely upon the former ruling.

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AS TO PREJUDICIAL CHARACTER OF ERRORS.

The market price of Cosumnes hops at Sacramento in November, 1912, was not less than 17 cents. It must be apparent from the fact that Pabst Company proved by testimony supported by cancelled checks, that it bought 818 bales of Cosumnes hops from November 13 to 25, 1912, at

prices ranging from 21 cents to 23 cents (which prices would be equivalent to 19½ cents to 21½ cents in Sacramento) and that Mr. Drescher actually sold to dealers in Sacramento 621 bales Cosumnes hops in November, December and January, 1912, at prices ranging from 17 cents to 18 cents, and that Mr. Sweeney bought 1500 bales in Sacramento in November, 1912, at 18¾ cents; that the jury would have found that the damages was the amount obtained by multiplying 400,000 lbs. (2000 bales) by the difference between 20 cents and whatever sale price they should have determined to be the market price at Sacramento—certainly not less than 17 cents, or a total of not to exceed $12,000; but for the testimony of Mr. Horst and Mr. Lange that it cost $4459.30 to sell air-dried Cosumnes hops at prices ranging from 14 cents to 17 cents during the same months.

The introductions of the Horst-Lange tabulations was therefore necessarily prejudicial error.

We are aware that there is a new trend of decisions with reference to the admission of books of very large concerns where there is such an enormous amount of business done that it becomes practically impossible that the litigant had conducted its business inaccurately because the number of employees, oftentimes ranging into the thousands, check over the daily transactions of each other and cannot be presumed to keep such books inaccurately.

But in such case, before the entries from the books are admitted, testimony very carefully checked is introduced to establish the necessity of the presumption that the books have been properly kept. In this case no person making entry in the books was offered to prove the manner of keeping the books, and no witnesses were sworn to testify concerning entries except the principal beneficiary of the self-serving declaration, who proudly testified (p. 135):

> "I prepared for the law suit before I picked the crop. I have had considerable experience in litigation. I always prepare for law suits immediately on their appearing in sight."

His manner of preparing is shown in the testimony. He actually produced statements as to the choiceness of his hops, signed by his neighbors in the Cosumnes district, as early as October 23, 1912, before the hops had been rejected by Pabst on November 4, 1912.

Some of the witnesses testified that these statements were signed under fraudulent representations that they were to be used to create a market for Cosumnes hops. They were Cosumnes hop growers.

The other witness as to the books was Horst's man Friday, Lange, who is equally proud of testifying that he had been Mr. Horst's assistant for ten years. They are both professional litigators.

But they did not testify to any number of witnesses being required for the primary proof. In

fact their testimony shows that two witnesses, to wit, the managers of the Chicago and New York offices could by depositions have given all the facts concerning prices obtained and overhead charges.

Certainly their own testimony shows they are not witnesses of a character whom the Court would ordinarily permit to introduce secondary evidence drawn from other secondary evidence, especially where, as in this case, the witnesses having the primary evidence, to wit: the managers of the New York and Chicago offices, and the bookkeeper of the San Francisco office, were available to the Horst Company and not sworn as witnesses, and Mr. Zipfel, who made the entries of the movements in the stock book (p. 228) was offered as a witness concerning the choiceness of the hops, but not as to the condition of the stock book. Their manner of evading cross-examination also shows that their secondary evidence should be received with caution.

The testimony rejected by the Court with reference to the quality, value, and character of Cosumnes hops, other than air-dried hops, was offered in direct response to the allegations made in the Pabst counterclaim, which specifically alleged (p. 32) a sale equal in all respects to the samples presented and submitted by Pabst Company which was specifically denied by defendant (p. 37).

Nowhere in the counterclaim or in the answer thereto is any mention made of air-dried hops.

For this reason and because in Pabst Company's answer it is alleged that Horst Company agreed

to make deliveries of choice Cosumnes hops (no mention being made of "air-dried") equal to certain samples (pp. 28 and 29), it was error to limit testimony to "air-dried" hops.

All evidence with reference to sale price of choice Cosumnes hops in November, 1912, was admissible.

It was for the jury to decide the effect of the evidence and whether the final contract was a quality or a sample contract.

The testimony given by Chalmers and Traganza concerning the picking of hops in an improper manner, and the immaturity of the Horst hops when picked should not have been stricken out. These questions went to the vital question as to the character of the hops from which samples 1 to 20 were drawn.

Mr. Lange testified that it was the habit to draw one sample out of each 20 bales.

Mr. Horst testified that all these bales were of the same character and that all were choice.

Certainly Chalmers' and Traganza's testimony was in rebuttal of this testimony of Horst.

Again the testimony of hop growers as to quality of samples submitted by a dealer to a brewer for brewing purposes, who specifically denied any claim to being hop experts, was prejudicial error.

While we do not wish to abandon the other points not dwelt upon as fully as those last quoted,

such for example as the refusal to permit the witness Conrad to answer as to whether or not there was any reason why the hops produced by Horst in 1912 should be sold cheaper than any other hops, and the overruling of the objection to the question asked Mr. Horst, viz: how much he estimated his overhead expenses were increased because of the sale of Pabst hops, which are evident errors; yet we feel that the great importance of those errors herein dwelt upon *in extenso* and we fear the Court may feel *ad nauseatum,* makes it unnecessary for us to more than mention them.

In this regard we wish to apologize to the Court for being so prolix concerning insertion herein of evidence showing the manner of keeping the books and the making of deductions therefrom, but we feel certain that when the Court realizes that we are asking this Court to find as error the introduction in evidence of compilations from said books under what would ordinarily appear to be a breach of fundamental rules of evidence the necessity for quoting the evidence itself, rather than stating our understanding of it will be apparent.

The total number of bales in question was 2000. The weight thereof was approximately 400,000 pounds.

Other dealers sold in November, 1912, at Sacramento for 17 cents to 19 cents. Brewers bought for from 20½ cents to 22½ cents at the same time.

Certainly the reasonable sale price of hops during that period could not have been held to be less than 17 cents but for the improper evidence.

This would make the loss by the breach of contract to Horst at the very utmost 3 cents per pound on the said 400,000 lbs. or $12,000.00.

It must be apparent, therefore, that when the jury gave a verdict of $22,625.30, they were moved by the evidence on the part of Horst, that he was compelled to sell hops belonging to Pabst at various prices, many of which ranged from 14 cents, 14½ cents to 15 cents in November, 1912, while paying salaries to a New York manager of $500.00 per month, with an assistant at $150.00 per month, and to a Chicago manager of $350.00 per month; and must have accepted as controlling the testimony of Mr. Lange that it was proper to prorate all the overhead expenses on the basis of 1346 bales to Pabst and 2536 bales to Horst, notwithstanding the fact that on November 4, 1912, Horst's San Francisco office had 10,500 bales to sell without allotting any of said overhead to any but 3882 bales.

If, therefore, this Court finds that there was any error in the introduction of the books or of the manner of computation of overhead, or of the manner of application of said overhead to the Pabst goods, or the curtailment of evidence to air-dried hops or the refusal of testimony as to the manner of picking and immaturity when picked or the improper use of farmer experts for quality of brew-

ing hops, we respectfully submit such error was prejudicial.

We respectfully submit that because of the numerous errors herein quoted, the decision here in question should be set aside, and a new trial held, that justice may be done.

Dated, San Francisco,
October 30, 1915.

Respectfully submitted,

HELLER, POWERS & EHRMAN,
*Attorneys for Plaintiff in Error.*

THOMAS J. GEARY,
JAMES L. ROBISON,
*Of Counsel.*